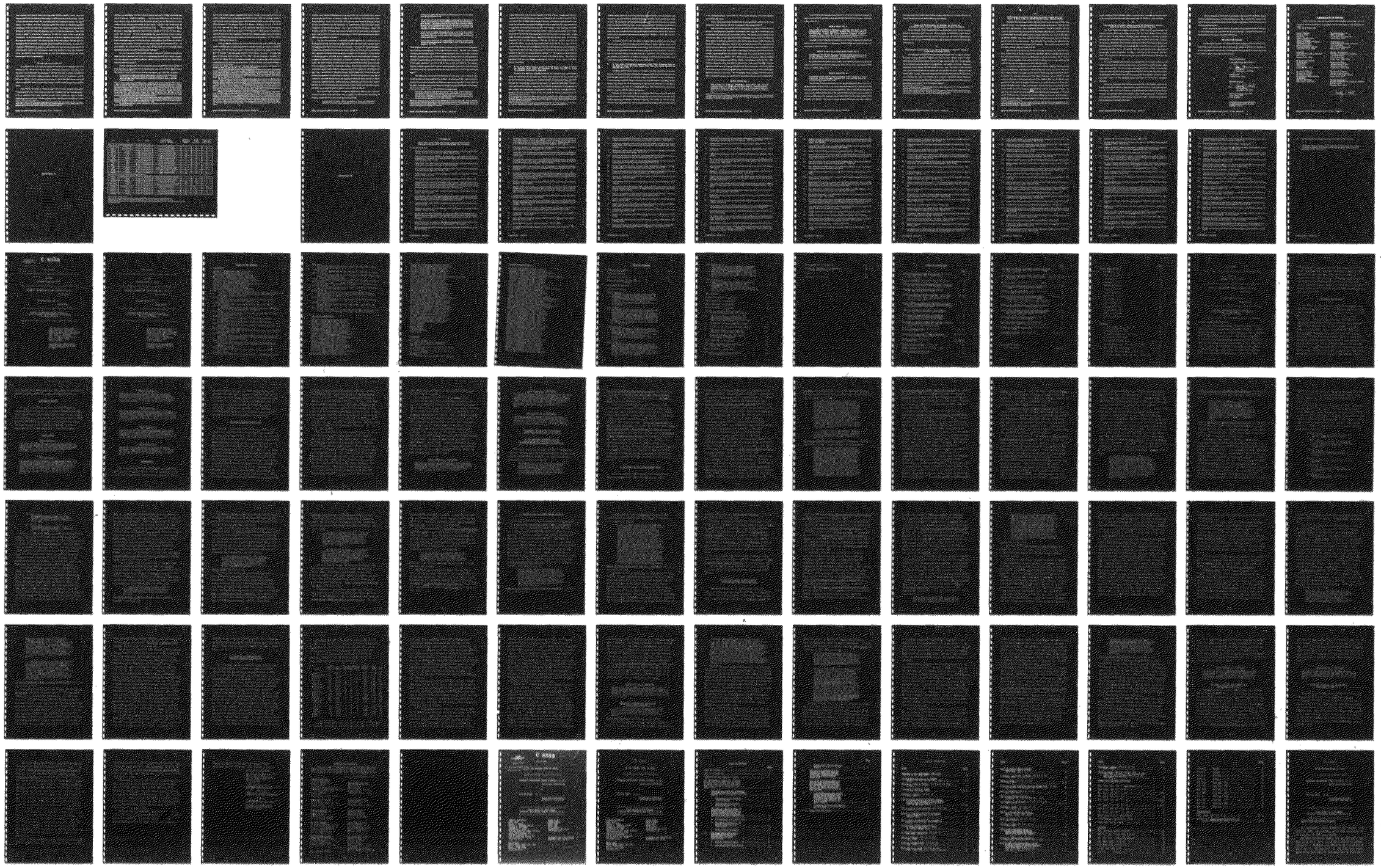
C-8353 SUPREME COURT OF TEXAS CASES 008
EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL. V. KIRBY, 1988-89
WILLIAM, ET AL. (3RD DISTRICT)



court's findings and ultimately found itself in agreement with those findings. *See id.* There is no indication that this Court deferred to these findings or otherwise declined to review them. Second, in *Texas State Employees Union* this Court determined that a fundamental interest—the right of privacy—was involved. *Id.* at 205. It therefore applied strict scrutiny to evaluate the legislative classification in that case, rather than rational basis analysis. This is more than a mere technical distinction between the *Texas State Employees Union* case and the present issue. When strict scrutiny is applied to a legislative classification, the state has a severe burden to uphold the classification: it must demonstrate that the classification achieves a compelling state interest in the least restrictive means possible. The rational basis test is much less stringent. The state need only demonstrate that its classification is rationally related to a legitimate state interest. As noted above, a legislative classification not subject to strict scrutiny is favored with strong presumptions of constitutionality, and in such circumstances, unlike those involved in *Texas State Employees Union*, the appellate court should consider any trial court findings in light of this strong presumption in favor of constitutionality.

2.

The State's Interest in Local Control

It is crucial to note at the outset that neither the trial court nor the Petitioners have ever declared that the relevant state interest—that of preserving a measure of local control over education—was anything other than legitimate.[33] The only issue, then, is whether this legitimate state interest in local control is rationally related to the state's system of classifications. And the trial court's findings—even if supported by the evidence—were no more than that the state could achieve its legitimate interest in preserving a measure of local control through more equitable means.

These findings are simply insufficient to support the trial court's sweeping annulment of Texas school finance law. Texas courts and others have repeatedly held that "not good enough," is not an indictment under equal protection analysis where fundamental rights or suspect classifications are not involved. That the legislature might have designed a school finance system

[33]The court in *Carl v. South San Antonio Independent School District*, 561 S.W.2d 560, 563 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.), specifically found that the state's interest in preserving a measure of local control was a legitimate purpose which could "hardly be classed as unreasonable and irrational."

(the trial court does not say how) that could have achieved more equity without undermining local control is irrelevant. "While the Legislature . . . may have gone farther than it did, and still have been within the limits of what the State Constitution permits, that they did not do so is not a violation of any constitutional mandate we have found. 'A statute is not invalid under the Constitution because it might have gone farther than it did . . . .'" *Texas Department of Human Resources v. Texas State Employees Union CSA/AFL-CIO*, 696 S.W.2d 164, 172 (Tex. App.—Austin 1985, no writ). The trial court's assertions that other, alternative systems of school finance were available cannot form the basis for its finding of unconstitutionality. "Imperfections, lack of mathematical precision in achieving the goal, some inequality of result from one citizen to the next, *and the existence of alternative or more effective means* do not invalidate the act." *Ex parte Robbins*, 661 S.W.2d 740, 743 (Tex. App.—El Paso 1983, no writ) (emphasis added) (upholding Texas Blue law against equal protection challenge).[34]

In view of the strong burden plaintiffs seeking to strike down a legislative classification under the rational basis test have to bear, it is not surprising that with only a single exception, every state appellate court that has applied the rational basis test to review their school finance system has upheld the system.[35]

The trial court determined that even if education was not a fundamental interest, the State of Texas had failed to demonstrate that the classifications inherent in the Texas School Finance

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[34]*See also Rose v. Doctors Hospital Facilities*, 735 S.W.2d 244, 249 (Tex. App.—Dallas 1987, writ granted):

> [A] statute does not violate equal protection merely because it imposes a heavier burden on one class of citizens, even though those citizens may be the ones most clearly in need. . . . [I]f there could exist a state of facts justifying legislative classifications or restrictions, the reviewing court will assume its existence.

[35]*See Fair School Finance Council of Oklahoma, Inc. v. Oklahoma*, 746 P.2d 1135, 1150 (Okla. 1987); *Hornbeck v. Somerset County Board of Education*, 458 A.2d 758, 786 (Md. 1983); *Board of Education, Levittown v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982), *dism'd*, 459 U.S. 1138, 103 S.Ct. 775, 74 L.Ed.2d 986 (1983); *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1017-19 (Co. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156, 167-68 (Ga. 1981); *Board of Education v. Walter*, 390 N.E.2d 813, 818-19 (Oh. 1979) *cert. denied*, 444 U.S. 1015, 100 S.Ct. 665, 62 L.Ed.2d 644 (1980); *Olsen v. State*, 554 P.2d 139, 144 (Or. 1976); *Thompson v. Engelking*, 537 P.2d 635, 644-45 (Idaho 1975). *See also McInnis v. Shapiro*, 293 F. Supp. 327 (N.D.Ill. 1968), *aff'd*, 394 U.S. 322, 89 S.Ct. 1197, 22 L.Ed.2d 308 (1969)(upholding constitutionality of Illinois school finance system under federal equal protection challenge and finding that system satisfied rational basis test).

The New Jersey Supreme Court upheld its school finance system against an equal protection challenge but struck the system down on other grounds. With respect to the equal protection challenge, the court found that the system met the rational basis test and even suggested that the state's interest in fostering local control might be compelling. *Robinson v. Cahill*, 303 A.2d 273, 282-87 (N.J. 1973).

The sole exception to this otherwise unanimous line of holdings is *Dupree v. Alma School District No. 30*, 651 S.W.2d 90 (Ark. 1983).

System were rationally related to a legitimate state interest. It made this determination in the face of evidence offered at trial and established precedents that have held that the State's interest in fostering local control is a legitimate interest that is rationally related to the dual local/state system of school finance.[36] The Supreme Court in *San Antonio v. Rodriguez*, 411 U.S. 4, 37-39, 93 S.Ct. 1278, 1298-1300, 36 L.Ed.2d 16 (1973), specifically held that the Texas system met the rational basis test. It did so on the basis of its finding that the state's interest in preserving a measure of local control was a legitimate interest that was rationally related to the use of a funding scheme that relied in part upon local funding to finance the cost of education. 411 U.S. at 44-55, 93 S.Ct. 1302-08, 36 L.Ed.2d 16.

What is frequently referred to by courts as the interest of the state in preserving "local control" is perhaps more accurately understood as a panoply of values the state has an interest in preserving. First, the state has an interest in insuring that, at least to some degree, local citizens direct the business of providing public education in their district. *See Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1021 (Co. 1982). *See also Thompson v. Engelking*, 537 P.2d 635, 645 (Idaho 1975)("In the American concept, there is no greater right to the supervision of the education of the child than that of the parent."). Second, the state has an interest in allowing

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[36] *See* 19 TEX. ADMIN. CODE § 165.1(a): "The [State Board of Education] believes that education is a responsibility of the state and should allow as much local control as possible."

The trial court's finding that the State's interest in maintaining some degree of local control is not embodied in statute or constitution [Tr. 575] is neither accurate nor determinative of the equal protection analysis. It is not accurate because the State's commitment to a dual system of finance and control of public education, a system involving both state and local involvement, is of constitutional stature. The Texas Constitution makes specific provision for and reference to local school districts, and in doing so reveals the State's legitimate interest in local control. *See, e.g.*, TEX. CONST. art. VII, §§ 3, 3a.

The court's finding is not determinative of equal protection analysis because it is not necessary that a state's interest, to satisfy the rational basis test, be embodied in the Constitution or a statute. In two recent cases upholding legislative classifications under the rational basis test, this Court simply stated a legitimate interest related to the classifications without pointing to any constitutional or statutory provision in which the interest was embodied. *See State v. Project Principle, Inc.*, 724 S.W.2d 387, 391 (Tex. 1987); *Eanes Independent School District v. Logue*, 712 S.W.2d 741, 742 (Tex. 1986). *See also Massachusetts Indemnity and Life Insurance Co. v. Texas State Board of Insurance*, 685 S.W.2d 104, 109 (Tex. App.—Austin 1985, no writ)(court looked to see whether "any combination of legitimate purposes" was related to the legislative classification).

Finally, it is particularly inappropriate to look only to the legislature's stated purpose in TEX. EDUC. CODE §16.001 to judge the entire public school finance system. [Tr. 590] Section 16.001 declares the stated purpose (i.e. the provision of access to appropriate programs and services that are "substantially equal to those available to any similar student, notwithstanding varying local economic factors") for only one portion of the Texas school finance system—i.e., the state's contribution to that system. Petitioners' attack upon the system, however, focuses upon local school district wealth and boundaries: Section 16.001 neither establishes nor attempts to justify Texas historical reliance upon local school districts to help finance public education. The reason for this reliance must therefore be sought and discovered elsewhere—i.e., in Texas' historical commitment to the values of local control.

localities some measure of discretion as to how local funds will be distributed among various governmental services such as education, police or fire protection, road construction, public transportation, etc. *See id.*, 537 P.2d at 646. Third, the state has an interest in fostering a climate in which school districts have the opportunity for "experimentation, innovation, and a healthy competition for educational excellence." *See id. See also Board of Education v. Walter*, 390 N.E.2d 813, 820 (Oh. 1979)(local control allows "freedom to devote more money to the education of one's children [and] also control over the participation in the decision-making process as to how those local tax dollars are to be spent").

The trial court had before it undisputed evidence supporting the conclusion that, as *Rodriguez* and the other state cases cited recognized, the state does indeed have a legitimate interest in maintaining some degree of local control over education. For example, Dr. Richard Kirkpatrick, superintendent of Copperas Cove Independent School District, one of the Petitioners, testified that local participation in educational decision-making was important to the operation of a school district in a democratic society. [SF 5235] And he admitted that his own school district had a measure of autonomy in implementing a philosophy of instruction, teaching, dealing with children, and testing. [SF 5240] Examples of other kinds of control exercised by local school districts included decisions relating to the selection of textbooks, whether a district would emphasize academic over vocational programs, student discipline, selection of sites for new schools, etc. [SF 5282-87] Dr. Dan Long, superintendent of Carrollton-Farmers Branch Independent School District, also affirmed the importance of local control in education. He observed that there is a great deal of variation in community attitudes toward and expectations concerning public education in Texas, variation that ultimately expresses itself in the decision-making processes of local school districts. [SF 5975-76] This local participation and control has a direct impact upon educational quality. [SF 5992] *See generally* SF 6223-44, 6669-71, 6723-24, 6837-44, 5406-07.

The trial court heard no evidence contradicting the previous testimony, and a significant amount of testimony on the same theme. But, in support of its departure from the holdings of *Rodriguez* and the state cases cited, it made the following findings:

1. Local control of school district operations in Texas has diminished dramatically in recent years, and today most of the meaningful incidents of

the education process are determined and controlled by state statutes and/or State Board of Education rule.

2. The element of local control that remains undiminished is the power of wealthy school districts to fund education at higher levels than property-poor districts. The property-poor districts have little or no local control because of their inadequate property tax base; the bulk of the revenues they generate are consumed by the building of necessary facilities and compliance with State mandated requirements.

3. Local control is largely meaningless except to the extent that wealthy districts are empowered to enrich their educational programs through their local property tax base, a power which is not shared equally by the State's property-poor districts.

4. Local control would not be compromised by a funding system which insured equalized opportunity for local districts to fund their educational programs. [Tr. 576]

These findings, however, simply reurge arguments rejected by the Supreme Court in *Rodriguez,* and which are not determinative of the equal protection analysis. The trial court's findings concerning the diminished degree of local control exercised in Texas is but an echo of Justice Marshall's dissenting opinion in which he suggested that the State of Texas lacked good faith in asserting its supposed interest in local control insofar as the State regulates "the most minute details of local public education." 411 U.S. at 126, 93 S.Ct. at 1345, 36 L.Ed.2d 16. The majority, however, citing the numerous areas in which local school districts continued to exercise discretion and control, decisively rejected the assertion that local control did not exist in any meaningful degree.[37]

The finding that local control has diminished in recent years is but a testimony to the competing objectives being sought after by the State. On the one hand it has sought to preserve a measure of local control in keeping with traditional regard for the importance of such control on education. On the other hand, it has endeavored, through centralized administration and guidance,

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[37]*See* 411 U.S. n.108 at 51, 93 S.Ct. at 1306, 36 L.Ed.2d 16 (citations omitted):

> This assertion, that genuine local control does not exist in Texas, simply cannot be supported. It is abundantly refuted by the elaborate statutory division of responsibilities set out in the Texas Education Code. Although policy decision making and supervision in certain areas are reserved to the State, the day-to-day authority over the "management and control" of all public elementary and secondary schools is squarely placed on the local school boards.

The Court continued by listing examples of local discretion set for in the Education Code. A review of current statutes relating to education demonstrate that local school districts continue to exercise substantial control of the content and operation of their public schools. A list of statutory provisions setting for areas of local discretion and control has been collected as Appendix "B" to this brief.

to bring improvement to all of the school districts in the State of Texas. *Compare School Board v. Louisiana State Board of Elementary & Secondary Education,* 830 F.2d 563, 572 (5th Cir. 1987), *cert. denied,* 108 S.Ct. 2884 (1988)(Louisiana's allocation of educational funds responsive to two competing and legitimate state goals of assuring each child an opportunity for a basic education on an equal basis and permitting and maintaining some measure of local autonomy over public education). The trial court did no more than attempt to call into question the legislative wisdom behind the precise blend between centralization and local control that currently exists. A state system may not be condemned because it imperfectly effectuates the state's goals. *See id.* (citing *Rodriguez,* 93 S.Ct at 1306; *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970)). *See also Ex Parte Robbins,* 661 S.W.2d 740, 743 (Tex. App.—El Paso, no writ)("Imperfections, lack of mathematical precision achieving the goal, some inequality of result from one citizen to the next, and the existence of alternative or more effective means do not invalidate [a legislative act on equal protection grounds].").[38] This kind of second-guessing has consistently and properly been rejected by the courts of the State of Texas. "The wisdom or expediency of the law is the Legislature's prerogative, not ours." *Smith v. Davis,* 426 S.W.2d 827, 831 (Tex. 1968).

C. If the Texas School Finance System Is Struck Down as Failing to Satisfy the Rational Basis Test, the Provision of Other Services by Local Governmental Units Will Be Imperiled.

The thrust of the trial court's determination that the Texas School Finance System failed to satisfy the rational basis test was that it was arbitrary and irrational for the State to allow the provision of education to hinge upon the "irrational accident" of school district lines. [Tr. 61].[39] Although this conclusion has a certain intuitive appeal, it is ultimately shortsighted. Certainly, "[a]ny scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary." *Rodriguez,* 411 U.S. at 53-54, 93 S.Ct. at 1307, 36 L.Ed.2d 16. The real question, however, is

[38]"As long as the state's means of achieving its objective is not so irrational as to be invidiously discriminatory, the financing scheme does not fail merely because other methods of serving these goals exist that would result in smaller interdistrict disparities in school support expenditures." *School Board v. Louisiana State Board of Elementary & Secondary Education,* 830 F.2d at 572.

[39]The court had no basis in fact or in law to find school district boundary lines to be irrational, as is more fully set out in the brief of Respondents Andrews Independent School District, *et. al,* under Reply Point No. 4.

whether viewed collectively, there is any justification for the existence of local governmental units themselves, with their necessarily attendant boundaries. The answer to this question must clearly be "yes". The idea that local governmental participation in the provision of services is a valuable asset to our political system runs deep. As one court has observed, "[i]nherent in the concept of local government is the belief that the public interest is furthered when the residents of a locality are given some voice as to the amount of services and expenditures therefor, provided that the cost is borne locally to stimulate citizen concern for performance." *Robinson v. Cahill,* 303 A.2d 273, 286 (N.J. 1973).

If, however, the trial court was correct in finding a lack of rational basis for a school finance system that relied in part upon local school districts to finance a portion of the cost of education, there is no conceptual basis for not also finding a lack of rational basis for allowing the provision of any government service to be based in any part upon local boundaries. In essence, then, the trial court's finding would strike down the state's reliance upon local governments to provide police and fire protection, construction and maintenance of roads, judicial functions, transit services and any other services funded in part by local tax revenues.

D. In View of the Constitutional Framework Under Which Education Exists in the State of Texas, the Court Should Find That The System Satisfies the Rational Basis Test.

The Texas School Finance System is not simply a free-form playground for academic theorists. It is a system carefully constrained by competing constitutional interests that define the forms that public education in Texas, and the financing of this education, can take. For example, it is constitutionally impossible simply to eliminate state funds for education to property-wealthy districts. TEX. CONST. art. VII, § 5 specifically provides that each school district in this State is entitled to receive money from the Available School Fund. This constitutional provision is not subject to change by either the courts or the legislature.

Similarly, it is not an option in Texas to accomplish school finance reform by abolishing the local property tax and substituting a state property tax in its stead, the revenues from which could be apportioned according to the dictates of equality. TEX. CONST. art. VIII, § 1-e flatly prohibits a state-wide property tax. Nor can local school districts simply be stripped of their ability

to levy local property taxes. TEX. CONST. art. VII, § 3 grants this power, and neither legislature nor court can take it away.

Finally, local school district boundaries have been specifically validated by the Texas Constitution. TEX. CONST. art. VII, § 3a, *as amended* (1909), *repealed* (1969).[40]

Each of the above constitutional provisions participates in forming a matrix for Texas education. Possibilities for school finance which scholars have suggested and which some states could perhaps even adopt are simply not available in Texas. The rational basis test must be viewed not from some abstract notion of possible varieties of equitable systems, but from the flesh-and-blood realities of the Texas constitutional system, and the school finance system that draws its blood from the Texas Constitution. Once viewed in this light, the present system must prevail as against Petitioners' challenge. Within present constitutional restraints and the generous, but not unlimited, commitment of the Texas budget to school finance, the current school finance formulas are highly equalizing [SF 6646-47], and little further equity can be achieved without the influx of more dollars for education [SF 2077, 2097]. Moreover, the goal of equalized educational funding is only one of many legitimate state educational goals. *See* Defendants' Exhibit No. 68—"1986-1990 Long Range Plan of the State Board of Education for Texas Public Education." Both the legislature and the courts of Texas are restrained by the Texas Constitution—all of it, not just one clause removed from its historical and legal context and turned into a master before which equally legitimate clauses must bow down. The Texas School Finance System is therefore rationally related to legitimate state goals and interests and to the restraints inherent in the Texas Constitution.

REPLY POINT NO. 3

THE COURT OF APPEALS PROPERLY ANALYZED THE TEXAS CONSTITUTION IN LIGHT OF ITS HISTORICAL DEVELOPMENT. (Response to Points of Error Nos. 1, 10-14, and 16 of Petitioners Edgewood I.S.D., *et al.*, and Points of Error Nos. 1, 5-6 of Petitioners Alvarado I.S.D., *et al.*)

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[40]Although article VII, § 3a was repealed in 1986, the provision repealing this section stated that "it [is] specifically understood that the repeal of these sections shall not in any way make any substantive changes in our present constitution." H.J.R. No. 3, Acts 1969, 61st.

Respondents Eanes Independent School District, *et al.*, hereby incorporate by reference the argument and authorities presented by Respondent Irving Independent School District with respect to Reply Point No. 3.

REPLY POINT NO. 4

THE COURT OF APPEALS PROPERLY ASSESSED THE ROLE OF THE INDEPENDENT SCHOOL DISTRICTS WITHIN THE CONSTITUTIONAL FRAMEWORK UNDER THE TEXAS SCHOOL FINANCE SYSTEM. (Response to Points of Error Nos. 10-14, 16 of Petitioners Edgewood I.S.D., *et al.*, and Points of Error Nos. 10-14, 16 of Petitioners Alvarado I.S.D., *et al.*)

Respondents Eanes Independent School District, *et al.*, hereby incorporate by reference the argument and authorities presented by Respondents Andrews Independent School District, *et al.*, with respect to Reply Point No. 4.

REPLY POINT NO. 5 AND CROSS POINT NO. 1

PETITIONERS HAVE NOT PROPERLY RAISED THEIR ARTICLE I, § 19 CLAIM. (Response to Point of Error No. 15 of Petitioners Edgewood I.S.D., *et al.*, and Point of Error No. 7 of Petitioners Alvarado I.S.D., *et al.*)

Respondents Eanes Independent School District, *et al.*, hereby incorporate by reference the argument and authorities presented by Respondents State of Texas, *et al.*, with respect to Reply Point No. 5 and Cross Point No. 1.

REPLY POINT NO. 6

ATTORNEY'S FEES ARE NOT RECOVERABLE. (Partial Response to Points of Error Nos. 17-20 of Petitioners Edgewood I.S.D., *et al.*, and Point of Error No. 8 of Petitioners Alvarado I.S.D., *et al.*)

The trial court declined to award attorney's fees against Respondents Eanes I.S.D., *et al.*, and Respondents Andrews I.S.D., *et al.*, based upon its finding that the school districts had sovereign immunity from such an award, and, alternatively, upon its determination that such an award would be neither equitable nor just. The trial court further declined to exercise its discretion to award such fees against the respondent school districts under TEX. CIV. PRAC. & REM. CODE §106.002. [Tr. 606-07.] The Court of Appeals properly affirmed the trial court's judgment

denying attorney's fees to Petitioners—both as a matter of law based on sovereign immunity and because the trial court did not abuse its discretion in so holding.

I.

THERE ARE NO PLEADINGS TO SUPPORT AN AWARD OF ATTORNEY'S FEES AGAINST THE RESPONDENT SCHOOL DISTRICTS

Neither Plaintiffs' Third Amended Petition nor Plaintiff Intervenors' Second Amended Petition in Intervention asserts any cause of action against the Respondent school districts. Moreover, neither pleading asserts any claim for attorney's fees against these school districts. Therefore, there is no basis in the pleadings for an award of attorney's fees against the Respondent school districts.

II.

RESPONDENT EANES I.S.D., *ET AL.*, HAVE SOVEREIGN IMMUNITY FROM A CLAIM FOR ATTORNEY'S FEES

The Respondent school districts have governmental immunity from any claim for attorney's fees under the Texas Declaratory Judgment Act, TEX. CIV. PRAC. & REM. CODE § 37.009.[41] School districts are government agents that enjoy the same immunity as the State. It is well settled that governmental immunity applies to school districts. For example, in *Russell v. Edgewood Independent School District*, 406 S.W.2d 249 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.), one of the Petitioners in the present suit was sued in a tort action arising out of the termination of a teacher. Edgewood Independent School District prevailed on the basis of the court's holding that "[t]his suit sounding in tort cannot be maintained against Edgewood Independent School District *because of the governmental immunity existing in this State in favor of independent school districts*." *Id.* at 251 (emphasis added).[42]

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[41]Section 37.009 provides that "[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just."

[42]*See also Barr v. Bernhard*, 562 S.W.2d 844, 846 (Tex. 1978); *Coleman v. Beaumont Independent School District*, 496 S.W.2d 245, 246 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.); *Braun v. Trustees of Victoria Independent School District*, 114 S.W.2d 947 (Tex. Civ. App.—San Antonio 1938, writ ref'd).

III.

PETITIONERS HAVE PLED NO CAUSE OF ACTION UNDER TEX. CIV. PRAC. & REM. CODE §§ 104.001-104.002 OR §§ 106.001-106.003

Petitioners have placed great reliance upon this Court's recent decisions in *Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation*, 746 S.W.2d 203 (Tex. 1987), and *Camarena v. Texas Employment Commission*, 754 S.W.2d 149 (Tex. 1988), to escape the general immunity possessed by the Respondent school districts. In these cases this Court found that the award of attorney's fees was proper under TEX. CIV. PRAC. & REM. CODE §§ 104.001-104.002. *Texas State Employees Union* and *Camarena* are not in any respect a general waiver of sovereign immunity. They represent, on the contrary, the application of a specific statutory exception to the general rule of immunity. That exception is set forth in TEX. CIV. PRAC. & REM. CODE §§ 104.001-104.002.

Petitioners have asserted in their briefs an entitlement to attorney's fees under TEX. CIV. PRAC. & REM. CODE § 106.002. However, they have neither pled nor could they plead a cause of action under § 106.001, which is the prerequisite to recovery of attorney's fees.[43] Section 106.002 is not an independent basis for the recovery of attorney's fees; it simply authorizes the award of such to the prevailing party *in an action under that section.*

No action has been pled or proved under sections 104.001-104.002 or 106.001-106.003 against *any* Respondent, and therefore no attorney's fees may be recovered, for the very reason that no action could have been pled or proved. Section 104.001 makes the State liable for "an act or omission" of a state agent that results in certain types of damages. Section 106.001 sets forth certain acts (relating to discrimination because of race, religion, color, sex, or national origin) prohibited to "[a]n officer or employee of the state or of a political subdivision of the state." Section 106.002(a) creates a cause of action against persons who have or are about to violate section 106.001 on the part of persons aggrieved by the violation or threatened violation. No individual, and certainly none of the Respondent school districts, have been sued for a violation of section 104.002 (an "act or omission") or of section 106.001 (i.e, for an *act* of discrimination). Rather, this case has always turned upon allegations by Petitioners that the *system* of public school

[43]Section 106.002(b) states that "*[i]n an action under this section*, unless the state is the prevailing party, the court may award the prevailing party reasonable attorney's fees as a part of the costs. The state's liability for costs is the same as that of a private person." (Emphasis added.)

finance, not the act of any individual official, is unconstitutional. Consequently, no grounds exist for the award of attorney's fees under either sections 104.001-104.002 or section 106.002(b).

IV.

THE AWARD OF ATTORNEY'S FEES AGAINST THE RESPONDENT SCHOOL DISTRICTS WOULD BE NEITHER EQUITABLE NOR JUST

The Texas Declaratory Judgment Act provides for the award of such reasonable and necessary attorney's fees as are "equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. TEX. CIV. PRAC. & REM. CODE § 106.002(b) simply indicates that a court *may* award the prevailing party reasonable attorney's fees as a part of the costs. Even if the award of attorney's fees against the Respondent school districts had some basis within these statutes, the trial court determined that it would be neither just nor equitable for it to award such fees and in the exercise of its discretion declined to do so. [Tr. 606-07] The trial court's decision in this regard may be reversed only for abuse of discretion. *See Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985). The trial court did not abuse its discretion and its decision should be affirmed for the following reasons.

First, the Respondent school districts were not the real parties in interest in this case, and should not be made to bear the brunt of this action to declare the Texas system of public school finance unconstitutional. This was and is an action against the State of Texas. It was brought without the expectation that attorney's fees would be obtained from any party other than the State. The Respondent school districts' participation in this case and their attempt to see that an issue of vital public interest was fully presented should not become the occasion for a windfall to Petitioners.

Second, the Respondent school districts were late arrivals to this litigation, and should not be made to bear the full liability for legal activities in which they did not even participate until after November 21, 1986. Even after the entrance of the Respondent school districts into this lawsuit, Petitioners incurred legal expenses that would have been incurred in any event. It would not be just to penalize the Respondent school districts with the full weight of expenses that would have been incurred even if they had not intervened.

Third, the Respondent school districts participated in this lawsuit to uphold duly adopted statutes, established precedents, and long standing practice. These districts were entitled to rely upon existing law and defend the present system of public school finance without facing the risk of incurring crippling legal fees.

For the reasons stated above, therefore, Respondents Eanes Independent School District, *et al.*, respectfully request the Court affirm the decision of the Court of Appeals and the trial court denying attorney's fees against said parties to Petitioners.

PRAYER FOR RELIEF

For the reasons set forth above, Respondents Eanes Independent School District, *et al.*, respectfully request that the judgment of the Court of Appeals be affirmed or, alternatively, reversed and remanded to the trial court, with Respondents being granted their costs on appeal and for such other relief to which they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief has been sent to all counsel of record as listed below, in accordance with the Texas Rules of Civil Procedure this 9th day of March, 1989.

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APPENDIX A

State	Case	Year	Citation	Constitutional Language Regarding System of Education	Education a Fundamental Right?	System Violates Equal Prot.?	System Violates Substantive Const. Clause?[1]
States Which Have Upheld the Constitutionality of Their School Finance Systems							
South Carolina	*Richland County*	1988	364 S.E.2d 470	"a system of free public schools"	—[2]	No	No
Oklahoma	*Fair School Finance*	1987	746 P.2d 1135	"a system of free public schools"	No	No	No
Maryland	*Hornbeck*	1983	458 A.2d 754	"a thorough and efficient System"	No	No	No
New York	*Levittown*	1982	439 N.E.2d 359	"a system of free common schools"	No	No	No
Colorado	*Lujan*	1982	649 P.2d 1005	"a thorough and uniform" system	No	No	No
Georgia	*McDaniel*	1981	285 S.E.2d 156	"provision of an adequate education"	No	No	No
Pennsylvania	*Danson*	1979	399 A.2d 360	"a thorough and efficient system"	—	No	No
Ohio	*Walter*	1979	390 N.E.2d 813	"a thorough and efficient system"	No	No	No
Oregan	*Olsen*	1976	554 P.2d 139	"a uniform, and general system"	No	No	No
Idaho	*Thompson*	1975	537 P.2d 635	"a general, uniform and thorough system"	No	No	No
Michigan	*Milliken*	1973	212 N.W.2d 711	"a system of free public . . . schools"	No	No	—
Arizona	*Shofstall*	1973	515 P.2d 590	"a general and uniform" system	Yes	No	No
States Which Have Found Their School Finance Systems Unconstitutional							
Montana	*Helena Elementary Sch. Dist.*	1989	unpublished	"equality of educational opportunity guaranteed"	—	—	Yes
Arkansas	*DuPree*	1983	651 S.W.2d 90	"a general, suitable, and efficient system"	—	Yes	—
Wyoming	*Washakie*	1980	606 P.2d 310	"a complete and uniform system"	Yes	Yes	—
West Virginia	*Pauley*	1979	255 S.E.2d 859	"a thorough and efficient system of free schools"	Yes	?[3]	?
Washington	*Seattle Sch. Dist. No. 1*	1978	585 P.2d 71	"a general and uniform system"	—	—	Yes
Connecticut	*Horton*	1977	376 A.2d 359	"free public . . . schools"	Yes	Yes[4]	—
New Jersey	*Robinson*	1973	303 A.2d 273	"a thorough and efficient system"	No	No	Yes
California	*Serrano*	1971	557 P.2d 929	"a system of common schools"	Yes	Yes	—

[1]That is, does the court find that the school finance system violates the state constitutional provision(s) regarding education.
[2]The presence of the dash ("—") here and elsewhere in the chart indicates that the issue was either not addressed or not decided.
[3]Findings relating to whether the system violated the equal protection clause or the substantive constitutional clause were to be determined on remand.
[4]Decision after remand.

APPENDIX B

APPENDIX B

TEXAS EDUCATION CODE AND TEXAS ADMINISTRATIVE CODE PROVISIONS RELATING TO LOCAL DISCRETION AND CONTROL

Local school boards may

1. Perform all educational functions not specifically delegated to the Central Education Agency. TEX. EDUC. CODE ANN. [hereinafter "TEC"] § 11.01.

2. Elect to provide community education for all age groups and upon application and pursuant to regulations prescribed by the Central Education Agency be reimbursed for such costs from state funds. TEC § 11.201.

3. Either utilize or refuse the services provided by Regional Service Centers with respect to use of citizen volunteers in public schools. TEC § 11.202(b).

4. Elect to develop a program of career education consistent with a statewide plan developed by the State Board of Education. TEC § 11.203.

5. Jointly approve, with a participating college or university, the supervisors of student teachers. TEC § 11.311(c).

6. Elect to be served by and participate in a regional education service center. TEC § 11.32.

7. Through the district school trustees delegate, under such terms as they deem best, to their employees power to requisition and distribute books and to mange books so long as such actions are not in variance with provisions of the Education Code or the rules for free textbooks adopted by the State Board of Education. TEC § 12.65(a).

8. Prescribe reasonable requirements for teachers for achieving professional improvement and growth. TEC § 13.110(2).

9. At its discretion where a charge has been made as to the inability or failure of a teacher to perform his assigned duties, establish a committee or classroom teachers and administrators before whom the teacher may request a hearing. TEC § 113.112(b).

10. Volunteer for pilot studies relating to supplemental contracts for math and science teachers. TEC § 13.117(f).

11. Determine the number of teacher appraisers to be used beyond the minimum number required . TEC § 13.303(b).

12. Reinstate a teacher whose reassignment to a lower career ladder resulted from performance appraisals that were influenced by extraordinary personal circumstances and who receives a clearly outstanding performance appraisal in the year following reassignment. TEC § 13.312(c).

13. Make final decisions with respect to career ladder determinations to be reviewed only if the decisions are arbitrary and capricious or made in bad faith. TEC § 13.319.

14. Develop guidelines by which the principal organizes the leadership structure in each school. TEC § 13.352(a).

15. Determine whether to develop and implement a program for employing qualified but noncertified persons to teach mathematics, science, computer science, and related technological subjects in the secondary schools of the district. Modify or abolish at any time a comprehensive plan adopted to establish such a program. TEC § 13.502.

16. Determine whether to require additional qualifications for noncertified instructors participating in the program described in TEC § 13.502.

17. Determine whether to require noncertified instructors to meet with parents or guardians of students to discuss students' grades or progress in courses as a condition of employment. TEC § 13.503.

18. Terminate the employment of the noncertified instructors participating in the program described in TEC § 13.502 whenever the board of trustees determines that the best interests of the school district are served thereby. TEC § 13.503(d).

19. Determine whether to use any federal, state, or local funds not specifically dedicated to another purpose by statue or contract to implement the provisions of TEC § 13.502. TEC § 13.505.

20. Determine whether to adopt a policy providing for placing an employee on leave of absence for temporary disability if, in the judgement of the governing board of a school district and in consultation with a physician, the employee's condition interferes with the performance of regular duties. TEC § 13.905(c).

21. Establish a maximum length, not less than 180 days, for a leave of absence for temporary disability. TEC § 13.905(f).

22. Require, within certain guidelines, a teacher entitled to a duty-free lunch to supervise students during lunch if necessary because of a personnel shortage, extreme economic shortage, extreme economic conditions, or an unavoidable or unforeseen circumstance. TEC § 13.909(c).

23. Acquire computer software for classroom use other than that which has been approved by the State Board of Education. TEC § 14.023.

24. Have the authority of transferring any school children who cannot be provided for by the district of their residence to any public school district maintaining adequate facilities and standards. TEC § 11.28(e).

25. Grant to a person who has served as superintendent, principal, supervisor or in any administrative position a continuing contract to serve as a teacher. TEC § 13.108.

26. Consult with teachers with respect to matters of educational policy and conditions of employment. TEC § 13.901.

27. Have full authority to establish a uniform retirement age for its professional and supportive personnel. TEC § 13.903.

28. Provide additional sick leave beyond the minimum. TEC § 13.904(a).

29. Use a portion of their support allocation to pay transportation costs, if necessary. TEC § 16.156(g).

30. Expend local maintenance funds in excess of the amount assigned to a district for any lawful school purpose or carry such funds over to the next school year. TEC § 16.253.

31. Vest general management and control of public free schools and high schools in each county, unless otherwise provided by law, in a board of county school trustees. TEC § 17.01(a).

32. Perform any other act consistent with law for the promotion of education in the county through the county school trustees. TEC § 17.31.

33. Provide for the protection, preservation, and disposition of all lands granted to the county for educational purposes through the commissioners court. TEC § 17.81.

34. Enter into all necessary agreements with the Employees Retirement System of Texas for qualified persons through the county school trustees. TEC § 17.91.

35. Provide funding for the office of county school superintendent through a voluntary agreement among the independent school districts of a county. TEC § 17.98.

36. Create an additional county-wide school district for the purpose of adopting a county-wide equalization tax for the maintenance of public schools. TEC §§ 18.01-18.31.

37. Assume the indebtedness of another district without an election on assumption of the indebtedness. TEC § 19.004(d).

38. Issue refunding bonds for bonds of another district assumed without an election. TEC § 19.004(e).

39. Sell and deliver any unissued bonds voted in a district prior to a change without an election and levy and collect taxes in the district as changed for the payment of principal and interest on bonds. TEC § 19.004(f).

40. Choose to participate in a single appraisal district if the annexed territory of a receiving district is located in two or more counties. TEC § 19.007(b) and (c).

41. Create an enlarged district by annexing one or more common or independent school districts. TEC § 19.021.

42. Detach territory from a school district and annex such territory to another school district, through petition of the commissioners court. TEC § 19.022.

43. Consolidate independent and/or common school districts through an election on the question. TEC § 19.051-19.058.

44. Dissolve any consolidated school district through an election on the question. TEC § 19.059.

45. Create a county-wide independent school district through an election on the question. TEC § 19.081-19.087.

46. Separate any municipal school district from municipal control, to become an independent school district, after hearing and an election on the question. TEC § 19.101-19.106.

47. Incorporate for school purposes any common school district, to become an independent school district, through an election on the question. TEC § 19.121-19.126.

48. Abolish any independent school district through an election on the question. TEC § 19.151-19.155.

49. Abolish any common school district through action of the commissioners court. TEC § 19.171-172.

50. Adjust common boundaries of any two contiguous school districts by agreement. TEC § 19.201.

51. Issue bonds, and levy and pledge ad valorem taxes to pay the principal and interest on said bonds, for the construction and equipment of school buildings and the purchase of necessary sites. TEC § 20.01.

52. Levy ad valorem taxes for the further maintenance of public free schools in the district. TEC § 20.02.

53. Refund or refinance all or any part of a district's outstanding bonds by the issuance of refunding bonds payable from ad valorem taxes. TEC § 20.05.

54. Acquire, purchase, construct, improve, enlarge, equip, operate and maintain gymnasia, stadia or other recreational facilities for and on behalf of a district, located within or without the district. TEC § 20.21.

55. Issue revenue bonds for the purpose of providing funds to acquire, purchase, construct, improve, enlarge and/or equip gymnasia, stadia or other recreational facilities. TEC § 20.22.

56. Fix and collect rentals, rates and changes from students and others for the occupancy or use of recreational facilities. TEC § 20.23.

57. Pledge all or any part of the revenue from recreational facilities to the payment of bonds. TEC § 20.24.

58. Refund or otherwise refinance any revenue bonds issued in connection with recreational facilities. TEC § 20.25.

59. Use bond proceeds issued for the statutory purpose of construction and equipment of school buildings to pay the cost to connect water, sewer or gas lines. TEC § 20.41.

60. Invest bond proceeds not immediately needed for the purposes for which such bonds were issued. TEC § 20.42.

61. Issue interest-bearing time warrants to make certain purchases and improvements if the district is financially unable to make such purchases and improvements out of available funds. TEC § 20.43.

62. Pledge delinquent school taxes levied for local maintenance purposes as security for a loan.

63. Levy an additional ad valorem tax for the purpose of paying the cost of the purchase, construction, repair, renovation, or equipment of public free school buildings and necessary sites therefor. TEC §§ 20.46 and 20.47.

64. Dedicate a specific percentage of the local tax levy to the use of a junior college district for facilities and equipment or for the maintenance and operating expenses of the junior college district. TEC § 20.48(e).

65. Invest or retain a gift, devise, or bequest made to a school district to provide college scholarships for graduates of the district. TEC § 20.482.

66. Borrow money for the purpose of paying maintenance expenses. TEC § 20.49.

67. Enter into a contract for the use of any stadium or other athletic facility owned by or under the control of any corporation, city, or any institution of higher learning of the State of Texas. TEC §. 20.50.

68. Issue time warrants sufficient to obtain funds to properly operate and maintain the district's schools, if the district is entitled to certain federal aid. TEC § 20.51.

69. Issue certificates of indebtedness for the erection and equipment of school buildings or refinancing outstanding certificates. TEC § 20.55.

70. Create an athletic stadium authority to include any two independent school districts. TEC § 20.56.

71. Issue, sell and deliver authorized but unissued bonds for another purpose after an election on the question. TEC § 20.52.

72. Require payment of fees in various areas including membership dues in student organizations, security deposit for return of materials, personal physical education and athletic equipment, and other specified areas. TEC § 20.53.

73. Seek the guarantee of eligible bonds by the corpus and income of the permanent school fund, upon approval by the commissioner. TEC §§ 20.901-20.913.

74. Sell surplus real property owned by the district and issue revenue bonds payable from the proceeds of the sale. TEC § 20.922.

75. Enter into contracts for the constructing or equipping of school buildings or the purchase of necessary sites therefor payable in installments to correspond with receipts of proceeds under a sale agreement or from the sale of any bonds to be issued. TEC § 20.924.

76. Issue, sell, and deliver revenue bonds with the principal and interest on such bonds to be payable from the sale of surplus real property. TEC § 20.925.

77. Change the name of a school district by resolution of the board of trustees. TEC § 21.006.

78. Operate for either two or three semesters during each school year. TEC § 21.008(a).

79. Charge tuition for the attendance of a student who is not domiciled in Texas and resides in military housing that is exempt from taxation by the district. TEC § 21.0312.

80. Elect a school attendance officer. TEC §§ 21.036-21.039.

81. Admit pupils either over or under the school age, either in or out of the district. TEC § 21.040.

82. Approve and agree in writing to the transfer of any child from his school district of residence to another Texas district. TEC § 21.061.

83. Approve the transfer of any child to a public school in a district of a bordering state. TEC § 21.073.

84. Transfer and assign pupils from one school facility or classrooms to another within the school district's jurisdiction. TEC § 21.074.

85. Arrange for the transfer and assignment of pupils between two or more adjoining districts or two or more adjoining counties, including the transfer of school funds proportionate to the transfer of pupils. TEC § 21.079.

86. Provide by contract for students residing in the district who are at grade levels not offered by the district to be educated at other accredited districts. TEC § 21.082.

87. Vary from the required curriculum as necessary to avoid hardship to the district. TEC § 21.101(e).

88. Conduct and supervise vocational classes and expend local maintenance funds as deemed necessary. TEC § 21.111.

89. Contract with another school district, or trade or technical school, to provide vocational classes for students in the district. TEC § 21.1111.

90. Employ vocational personnel on 10-, 11-, or 12-month contracts, and assign vocational teachers to teach other subject areas in which the teacher is certified. TEC § 21.112(h) and (i).

91. Use vocational program facilities and equipment for nonvocational instructional programs. TEC § 21.112(j).

92. Call an election to determine whether the district shall establish and maintain a kindergarten as part of the public free schools of the district. TEC § 21.132.

93. Operate public school kindergartens on a half-day or full-day basis at the option of the district. TEC § 21.135.

94. Make emergency purchases of school buses. TEC § 21.162.

95. Purchase school buses with funds provided by gifts, profits from athletic contests, or other school enterprises not supported by tax funds. TEC § 21.164.

96. Issue interest-bearing time warrants to purchase school buses if the district is financially unable to make immediate payment. TEC § 21.166.

97. Furnish transportation by school bus to the nearest college or university for residents of the district who are enrolled at the college or university. TEC § 21.172.

98. Establish and operate an economical public school transportation system within the district. TEC § 21.174.

99. Use school buses for transportation of pupils and personnel on extracurricular activities, and contract with nonschool organizations for the use of school buses. TEC § 21.175.

100. Contract with a public or commercial transportation company for all or any part of the district's public school transportation. TEC § 21.181.

101. Choose not to renew the employment of any teacher employed under a term contract effective at the end of the contract period. TEC § 21.203.

102. Provide by written policy for a probationary period not to exceed the first two years of continuous employment. TEC § 21.209.

103. Adopt a plan for microfilming records and reports to accurately and permanently copy, reproduce or originate records and reports on films. TEC § 21.259.

104. Suspend a student or remove a student to an alternative education program. TEC § 21.301.

105. Expel a student from school for more than six school days within a semester. TEC § 21.3011.

106. Close the school or suspend operations, or request assistance through military force to maintain law, peace and order in the operation of the public schools. TEC § 21.305.

107. Employ security personnel for use in any school. TEC § 21.308.

108. Contract with the county to provide joint library facilities under certain circumstances. TEC § 211.351.

109. Approve participation by a student who does not have limited English proficiency in a bilingual education program. TEC § 21.455(g).

110. Transfer a student of limited English proficiency out of a bilingual education program if the student is able to participate equally in a regular all-English program. TEC § 21.455(h).

111. Join with other districts to provide bilingual education programs. TEC § 21.457.

112. Promulgate rules and regulations for the safety and welfare of students, employees, and property as may be deemed necessary. TEC § 21.482.

113. Employ campus security personnel and authorize any officer to bear arms. TEC § 21.483.

114. Provide for the issuance and use of vehicle identification insignia. TEC § 21.487.

115. Refuse to allow persons having no legitimate business to enter school property, and eject any undesirable person from school property upon a refusal to leave peacably on request. TEC § 21.489.

116. Employ special education personnel on a full-time, part-time, or consultative basis, or on a 10-, 11-, or 12-month basis. TEC § 21.504.

117. Operate joint special education programs with other districts. TEC § 21.505.

118. Contract with a public or private facility, institution or agency for the provisions of services to handicapped students. TEC § 21.506.

119. Adopt and administer criterion and assessment instruments in addition to those adopted by the Central Education Agency. TEC § 21.554.

120. Establish a school-community guidance center. TEC § 21.601.

121. Develop cooperative programs with state youth agencies for children found guilty of delinquent conduct. TEC § 21.602.

122. Obtain a district court order requiring a parent to comply with an agreement in connection with a student admitted to a school-community guidance center. TEC § 21.606.

123. Establish a program for gifted and talented students. TEC § 21.652.

124. Contract for the replacement or repair of school buildings and equipment when it is determined that the competitive bidding process would prevent or impair the conduct of classes or other school activities. TEC § 21.901(e).

125. Purchase computers and computer-related equipment without submitted the purchase to competitive bidding, if the equipment is on an approved equipment list. TEC § 21.901(f).

126. Provide late afternoon and evening session school programs. TEC § 21.902.

127. Secure insurance against bodily injuries sustained by students participating in interschool athletic competition. TEC § 21.906.

128. Establish a health care plan for employees of the district and dependents of employees. TEC § 21.922.

129. Order that trustees of any independent school district are to be elected from single member districts. TEC § 23.024.

130. Through the board of trustees of an independent school district, acquire and hold real and personal property, sue and be sued, receive bequests and donations, have exclusive power to manage and govern the schools of the district, vest in all rights and title to school property, and adopt rules, regulations and bylaws as deemed proper. TEC § 23.26.

131. Employ by contract a superintendent, principals, teachers, or other executive officers. TEC § 23.28.

132. Sell minerals in land or any part thereof belonging to an independent school district. TEC § 23.29.

133. Authorize the sale of any property, other than minerals, held in trust for school purposes. TEC § 23.30.

134. Exercise the right of eminent domain to acquire fee simple title to real property for any purpose deemed necessary for the independent school district. TEC § 23.31.

135. Consolidate the assessing and collecting of taxes of two or more independent school districts. TEC § 23.97.

136. Create a rehabilitation district to provide education, training, special services, and guidance to handicapped persons. TEC §§ 26.01-26.73.

137. Establish county industrial training school districts to provide vocational training. TEC §§ 27.01-27.08

138. Local school boards are the best agencies for managing and controlling operations in school districts. 19 TEX. ADMIN. CODE [hereinafter "TAC"] 33.3.

139. Establish the holidays to be observed by the district. 19 TAC 61.162.

140. Allow students to earn credit in grades nine - twelve by taking correspondence courses from another educational institution. 19 TAC 75.163.

141. Develop experimental courses designed to enable students to master knowledges, skills, and competencies not included in the essential elements of the curriculum. 19 TAC 75.164.

142. Offer one or more courses for local credit only which may not be counted toward state graduation requirements. 19 TAC 75.165.

143. Allow students enrolled in grades nine - twelve to be awarded credit toward high school graduation for completing college level courses. 19 TAC 75.167.

144. Establish summer school programs. 19 TAC 75.168.

145. Apply for special dispensation because of extreme hardship with the implementation of provisions relating to curriculum. 19 TAC 75.171.

146. Report grades as numerical scores or letter grades. 19 TAC 75.191(d).

147. Allow students to take courses in addition to local graduation requirements on a pass/fail basis. 19 TAC 75.194.

148. Operate a preschool, summer school, and extended time program for limited English proficient students. 19 TAC 77.363.

149. Elect to discontinue a district's participation in a media services program provided through the education service center. 19 TAC 81.43.

150. Retain out-of-adoption textbooks to be used by the school for reference, teaching aids, or library use. 19 TAC 81.154.

151. Include as student services home/school coordination, school psychological services, school lunch, and child nutrition, and transportation. 19 TAC 85.1(b).

152. Enter into a contract with, or accept money from, an agency of the federal government. 19 TAC 113.1.

153. Activate a noncertified instructor's permit for an individual assigned to teach in a technology education program. 19 TAC 141.300(a).

154. Determine the number of paraprofessionals and level of job performance desired for the operation of the school district's program. 19 TAC 141.362(b).

155. Include a teacher's 45-minute planning and preparation period within the extended school days in districts which extend the school day beyond seven hours. 19 TAC 145.44(c).

156. Provide a developmental leave program for teachers and other certified personnel. 19 TAC 145.45.

157. The state should allow as much local control as possible. 19 TAC 165.1(a).

The Central Education Agency itself is subject to the Texas Sunset Act. Unless continued in existence as provided by that Act, the agency will be abolished September 1, 1989. TEC § 11.011.

C 8353

NO. C-8353

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners

V.

WILLIAM KIRBY, ET AL.,

Respondents

ANDREWS INDEPENDENT SCHOOL DISTRICT, ET AL.'S BRIEF IN RESPONSE TO APPLICATION FOR WRIT OF ERROR

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ATTORNEYS FOR RESPONDENTS,
ANDREWS INDEPENDENT SCHOOL
DISTRICT, ET AL.

NO. C-8353

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ATTORNEYS FOR RESPONDENTS,
ANDREWS INDEPENDENT SCHOOL
DISTRICT, ET AL.

NAMES OF ALL PARTIES

PLAINTIFFS:

Edgewood Independent School District
Socorro Independent School District
Eagle Pass Independent School District
Brownsville Independent School District
San Elizario Independent School District
South San Antonio Independent School District
La Vega Independent School District
Pharr-San Juan-Alamo Independent School District
Kenedy Independent School District
Milano Independent School District
Harlandale Independent School District
North Forest Independent School District
on their own behalves, on behalf of the residents of their districts, and on behalf of other school districts and residents similarly situated

Aniceto Alonzo
on his own behalf and as next firend of Santos Alonzo, Hermelinda Alonzo and Jesus Alonzo

Shirley Anderson
on her own behalf and as next friend of Derrick Price

Juanita Arredondo
on her own behalf and as next friend of Augustin Arredondo, Jr., Nora Arredondo and Silvia Arredondo

Mary Cantu
on her own behalf and as next friend of Jose Cantu, Jesus Cantu and Tanatiuh Cantu

Josefina Castillo
on her own behalf and as next friend of Maria Coreno

Eva W. Delgado
on her own behalf and as next friend of Omar Delgado

Ramona Diaz
on her own behalf and as next friend of Manuel Diaz and Norma Diaz

Anita Gandara and Jose Gandara, Jr.
on their own behalves and as next friend of Lorraine Gandara and Jose Gandara, III

Nicolas Garcia
on his own behalf and as next friend of Nicolas Garcia, Jr., Rodolfo Garcia, Rolando Garcia, Graciela Garcia, Criselda Garcia, and Rigoberto Garcia

Raquel Garcia
on her own behalf and as next friend of Frank Garcia, Jr., Roberto Garcia, Ricardo Garcia, Roxanne Garcia and Rene Garcia

Hermelinda C. Gonzales
on her own behalf and as next friend of Angelica Maria Gonzales

Ricardo J. Molina
on his own behalf and as next friend of Job Fernando Molina

Opal Mayo
on her own behalf and as next friend of John Mayo, Scott Mayo and Rebecca Mayo
Hilda S. Ortiz
on her own behalf and as next friend of Juan Gabriel Ortiz
Rudy C. Ortiz
on his own behalf and as next friend of Michelle Ortiz, Eric Ortiz and Elizabeth Ortiz
Estela Padilla and Carlos Padilla
on their own behalves and as next friend of Gabriel Padilla
Adolfo Patino
on his own behalf and as next friend of Adolfo Patino, Jr.
Antonio Y. Pina
on his own behalf and as next friend of Antonio Pina, Jr., Alma Mia Pina, and Ana Pina
Reymundo Perez
on his own behalf and as next friend of Ruben Perez, Reymundo Perez, Jr., Monica Perez, Raquel Perez, Rogelio Perez, and Ricardo Perez
Demetrio Rodriguez
on his own behalf and as next friend of Patricia Rodriguez and James Rodriguez
Lorenzo G. Solis
on his own behalf and as next friend of Javier Solis and Cynthia Solis
Jose A. Villalon
on his own behalf and as next friend of Ruben Villalon, Rene Villalon, Maria Christina Villalon, and Jaime Villalon

PLAINTIFF-INTERVENORS:

Alvarado Independent School District
Blanket Independent School District
Burleson Independent School District
Canutillo Independent School District
Chilton Independent School District
Copperas Cove Independent School District
Covington Independent School District
Crawford Independent School District
Crystal City Independent School District
Early Independent School District
Edcouch-Elsa Independent School District
Evant Independent School District
Fabens Independent School District
Farwell Independent School District
Godley Independent School District
Goldthwaite Independent School District
Grandview Independent School District
Hico Independent School District
Jim Hogg County Independent School District
Hutto Independent School District
Jarrell Independent School District

Jonesboro Independent School District
Karnes City Independent School District
La Feria Independent School District
La Joya Independent School District
Lampasas Independent School District
Lasara Independent School District
Lockhart Independent School District
Los Fresnos Consolidated Independent School District
Lyford Independent School District
Lytle Independent School District
Mart Independent School District
Mercedes Independent School District
Meridian Independent School District
Mission Independent School District
Navasota Independent School District
Odem-Edroy Independent School District
Palmer Independent School District
Princeton Independent School District
Progresso Independent School District
Rio Grande City Independent School District
Roma Independent School District
Rosebud-Lott Independent School District
San Antonio Independent School District
San Saba Independent School District
Santa Maria Independent School District
Santa Rosa Independent School District
Shallowater Independent School District
Southside Independent School District
Star Independent School District
Stockdale Independent School District
Trenton Independent School District
Venus Independent School District
Weatherford Independent School District
Ysleta Independent School District
Connie Demarse
H. B. Halbert
Libby Lancaster
Judy Robinson
Frances Rodriguez
Alice Salas

DEFENDANTS:

William N. Kirby
Texas Commissioner of Education
The Texas State Board of Education
Mark White
Former Governor of the State of Texas
Robert Bullock
Comptroller of the State of Texas
The State of Texas
Jim Mattox
Attorney General of the State of Texas

DEFENDANT-INTERVENORS:

Andrews Independent School District
Arlington Independent School District
Austwell Tivoli Independent School District
Beckville Independent School District
Carrollton-Farmers Branch Independent School District
Carthage Independent School District
Cleburne Independent School District
Coppell Independent School District
Crowley Independent School District
DeSoto Independent School District
Duncanville Independent School District
Eagle Mountain-Saginaw Independent School District
Eanes Independent School District
Eustace Independent School District
Glasscock Independent School District
Grady Independent School District
Grand Prairie Independent School District
Grapevine-Colleyville Independent School District
Hardin Jefferson Independent School District
Hawkins Independent School District
Highland Park Independent School District
Hurst Euless Bedford Independent School District
Iraan-Sheffield Independent School District
Irving Independent School District
Klondike Independent School District
Lago Vista Independent School District
Lake Travis Independent School District
Lancaster Independent School District
Longview Independent School District
Mansfield Independent School District
McMullen Independent School District
Miami Independent School District
Midway Independent School District
Mirando City Independent School District
Northwest Independent School District
Pinetree Independent School District
Plano Independent School District
Prosper Independent School District
Quitman Independent School District
Rains Independent School District
Rankin Independent School District
Richardson Independent School District
Riviera Independent School District
Rockdale Independent School District
Sheldon Independent School District
Stanton Independent School District
Sunnyvale Independent School District
Willis Independent School District
Wink-Loving Independent School District

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NO. C-8353

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners

V.

WILLIAM KIRBY, ET AL.,

Respondents

ANDREWS INDEPENDENT SCHOOL DISTRICT, ET AL.'S BRIEF IN RESPONSE TO APPLICATION FOR WRIT OF ERROR

TO THE SUPREME COURT OF TEXAS:

Come now Respondents Andrews Independent School District, Carrollton-Farmers Branch Independent School District, Coppell Independent School District, Crowley Independent School District, DeSoto Independent School District, Duncanville Independent School District, Glasscock County Independent School District, Hawkins Independent School District, Highland Park Independent School District, Iraan-Sheffield Independent School District, Lancaster Independent School District, Mansfield Independent School District, Midway Independent School District, Plano

Independent School District, Quitman Independent School District, Rains Independent School District, Richardson Independent School District, Stanton Independent School District, Sunnyvale Independent School District, Willis Independent School District, and Wink-Loving Independent School District, and file this, Andrews Independent School District, et al.'s Brief in Response to Application for Writ of Error and they would respectfully show the Court as follows:

STATEMENT OF THE CASE

The Plaintiffs filed suit for a declaratory judgment that the Texas School Finance System, as codified in Section 16.01 et seq. of the Texas Education Code violates Art. I, Sec. 3 and Sec. 3a; Art. VII, Sec. 1; and Art. VIII, Sec. 1 of the Texas Constitution. The trial court found that education was a fundamental right under the Texas Constitution, that wealth was a suspect classification, and entered a Declaratory Judgment holding the Texas School Finance System (Tex. Ed. Code Section 16.01, et seq. implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education) to be unconstitutional and unenforceable in law. The Third Court of Appeals reversed the trial court. It held that education is not a fundamental right; wealth is not a suspect classification; and that the Texas School Finance System is rationally related to the legitimate goal of

local control and is constitutional. The opinion of the Court of Appeals correctly states the nature and results of the suit.

ADOPTION OF BRIEFS

In order to conform to the fifty (50) page maximum for Briefs set forth in Rule 136 of the Rules of Appellate Procedure, these Respondents will brief some points of error in more depth than others and will adopt the Briefs filed by the State of Texas and other Respondents herein, rather than unnecessarily repeat and duplicate some of the arguments briefed by the other Respondents that are also applicable to these Respondents.

REPLY POINTS

REPLY POINT NO. 1

THE COURT OF APPEALS PROPERLY BALANCED THE RESPECTIVE ROLES OF THE COURTS AND THE LEGISLATURE UNDER THE TEXAS CONSTITUTION. (Germane to Petitioner Edgewood's Points of Error No. 11, 12, 13, and 14, and to Petitioner Alvarado's Points of Error No. 5 and and 6)

REPLY POINT NO. 2

THE COURT OF APPEALS PROPERLY DETERMINED THAT THE TEXAS SCHOOL FINANCE SYSTEM DOES NOT VIOLATE ART. I, SEC. 3 OF THE TEXAS CONSTITUTION AND THAT EDUCATION IS NOT A FUNDAMENTAL RIGHT NOR IS WEALTH A SUSPECT CLASSIFICATION. (Germane to Petitioner Edgewood's Points of Error No. 1, 2, 3, 4, 5, 6, 7, 8, and 9, and to Petitioner Alvarado's Points of Error No. 1, 2, 3, and 4)

REPLY POINT NO. 3

THE COURT OF APPEALS PROPERLY ANALYZED THE TEXAS CONSTITUTION IN LIGHT OF ITS HISTORICAL DEVELOPMENT. (Germane to Petitioner Edgewood's Points of Error No. 1, 2, 3, 4, 5, 9, 10, 12, and 13, and to Petitioner Alvarado's Points of Error No. 1, 2, 3, 4, 5, and 6)

REPLY POINT NO. 4

THE COURT OF APPEALS PROPERLY ASSESSED THE ROLE OF SCHOOL DISTRICTS WITHIN THE CONSTITUTIONAL FRAMEWORK OF THE TEXAS SCHOOL FINANCE SYSTEM (Germane to Petitioner Edgewood's Points of Error No. 1, 2, 3, 4, 5, 7, 9, and 10, and to Petitioner Alvarado's Points of Error No. 1, 2, 3, 4, and 5)

REPLY POINT NO. 5

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THERE WAS NO BASIS IN THE DISTRICT COURT'S JUDGMENT FOR A DETERMINATION ON THE DUE COURSE OF LAW PROVISIONS. (Germane to Petitioner Edgewood's Point of Error No. 15 and to Petitioner Alvarado's Point of Error No. 7)

REPLY POINT NO. 6

THE COURT OF APPEALS CORRECTLY REFUSED TO ASSESS ATTORNEYS' FEES AGAINST THE RESPONDENTS. (Germane to Petitioner Edgewood's Points of Error No. 17, 18, 19, and 20, and to Petitioner Alvarado's Point of Error No. 8)

INTRODUCTION

The Plaintiffs and Plaintiff-Intervenors were Appellees below and are Petitioners herein. Both the Plaintiffs and the Plaintiff-Intervenors have filed separate applications for writ

of error; however, they each set forth essentially the same arguments and authorities. For ease of reference they will be referred to collectively as Plaintiffs or Petitioners and their applications for a writ of error will be responded to jointly unless clarity requires reference to a specific party or application. Likewise, the Defendants and the Defendant-Intervenors, Appellants below and Respondents herein, will be referred to collectively as Defendants or Respondents.

PROCEDURAL HISTORY OF THE CASE

Plaintiffs' Original Petition was filed on May 23, 1984, alleging that the Texas School Finance System (as it existed at that time) was unconstitutional. (Tr. Vol. I, p. 3). The filing of the Original Petition occurred during a special session of the Texas Legislature called by former Governor Mark White for the specific purpose of addressing school funding and other educational issues. (Tr. Vol. I, p. 30). House Bill 72, which completely revamped funding of the Texas School Finance System was passed during that special session. The Plaintiff school districts wanted the attention of the Texas Legislature during this crucial special session and gained political recognition by the filing of this suit. (Tr. Vol. II, pp. 363-364). The Plaintiff school districts were supporters of the passage of House Bill 72. (S.F. Vol. V, p. 354). Yet, on March 5, 1985, they filed their Plaintiffs' First Amended Petition alleging that

the School Finance System established by House Bill 72, which they supported only a few months before, is unconstitutional. (Tr. Vol. I, p. 39). The State filed a Motion for Summary Judgment on October 24, 1986. (Tr. Vol. I, p. 76). Other than the filing of a response to the State's Summary Judgment, the case had little activity in court until late November of 1986, just prior to the time the 1987 legislature was to meet, at which time these and other Defendant school districts filed Petitions in Intervention. (Tr. Vol. I, p. 214; Vol. II, pp. 219, 231, 241, 282, 316, 322, 329, 335, 336, 339, and 416). The Plaintiffs also added a number of additional school districts. (Tr. Vol. II, pp. 247 and 282).

The case was tried to the court without a jury. On June 1, 1987, the Honorable Harley Clark entered a Final Judgment declaring that the Texas School Finance System, (Tex. Ed. Code §16.01 et seq., implemented in conjunction with local school district boundaries that contain unequal taxable property and wealth for the financing of public education) is unconstitutional and unenforceable in law. The trial court held that the Texas School Finance System violates Art. I, Sec. 3, Sec. 3a (Equal Protection), Art. I, Sec. 19, Sec. 29 (Due Process), and Art. VII, Sec. 1 (Efficient System of Free Public Schools) of the Texas Constitution. The trial court ordered corresponding injunctive relief but stayed that portion of its Order for approximately two years. (Tr. Vol. III, p. 498). The trial

court filed extensive Findings of Fact and Conclusions of Law. (Tr. Vol. III, pp. 536-609).

The cornerstone of the trial court's judgment was a determination that education is a fundamental right under Art. VII, § 1 of the Texas Constitution and that wealth is a suspect classification. The trial court applied strict scrutiny and held that the Texas School Finance System was not justified by any compelling State interest. The trial court also found the system to be inefficient and in violation of Art. VII, Sec. 1 of the Texas Constitution. Additionally, the trial court found that local control is not a justification for the State's school finance system and that the school district boundaries are irrational. (Tr. Vol. III, pp. 573 and 575). The Court of Appeals for the Third Supreme Judicial District of Texas reversed the trial court. The Court of Appeals took a diametrically opposed position in this case. It held that education was not a fundamental right, that wealth is not a suspect classification, that the goal of local control justified the State system, and that efficiency was a political issue.

REPLY POINT NO. 1 (RESTATED)

THE COURT OF APPEALS PROPERLY BALANCED THE RESPECTIVE ROLES OF THE COURTS AND THE LEGISLATURE UNDER THE TEXAS CONSTITUTION. (Germane to Petitioner Edgewood's Points of Error No. 11, 12, 13, and 14, and to Petitioner Alvarado's Points of Error No. 5 and and 6)

REPLY POINT NO. 2 (RESTATED)

THE COURT OF APPEALS PROPERLY DETERMINED THAT THE TEXAS SCHOOL FINANCE SYSTEM DOES NOT VIOLATE ART. I, SEC. 3 OF THE TEXAS CONSTITUTION AND THAT EDUCATION IS NOT A FUNDAMENTAL RIGHT NOR IS WEALTH A SUSPECT CLASSIFICATION. (Germane to Petitioner Edgewood's Points of Error No. 1, 2, 3, 4, 5, 6, 7, 8, and 9, and to Petitioner Alvarado's Points of Error No. 1, 2, 3, and 4)

REPLY POINT NO. 3 (RESTATED)

THE COURT OF APPEALS PROPERLY ANALYZED THE TEXAS CONSTITUTION IN LIGHT OF ITS HISTORICAL DEVELOPMENT. (Germane to Petitioner Edgewood's Points of Error No. 1, 2, 3, 4, 5, 9, 10, 12, and 13, and to Petitioner Alvarado's Points of Error No. 1, 2, 3, 4, 5, and 6)

STATEMENT, ARGUMENT AND AUTHORITIES UNDER REPLY POINTS NOS. 1, 2, AND 3

A. THE RATIONAL BASIS ANALYSIS IS THE APPROPRIATE STANDARD OF REVIEW FOR EQUAL PROTECTION ANALYSIS IN THIS CASE

The beginning point in any equal protection analysis is legal, not factual, and involves establishing the standard under which the statute will be reviewed. The Texas Supreme Court articulated the standard of review as:

> The general rule is that when the classification created by the state regulatory scheme neither infringes fundamental rights or interests nor burdens an inherently suspect class, equal protection analysis requires that the classification be rationally related to a legitimate state interest.

Sullivan v. University Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981); Spring Branch Independent School District v. Stamos, 695 S.W.2d 556, 559 (Tex. 1985); see also Whitworth v. Bynum, 699 S.W.2d 194 (Tex. 1985).

This is the rational basis analysis. However, if the statute burdens an inherently suspect class or infringes upon fundamental rights it will be subject to strict scrutiny which requires the state to establish that the statute is justified by a compelling state interest that can be achieved by no less intrusive, more reasonable means. Spring Branch Independent School District v. Stamos, 695 S.W.2d 556, 559 (Tex. 1985); Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987); Hernandez v. Houston Independent School District, 558 S.W.2d 121, 123 (Tex. Civ. App. - Austin 1977, writ ref'd n.r.e.). Therefore, the pivotal questions in this case are whether education is a fundamental right under the Texas Constitution and whether wealth is a suspect classification. The Court of Appeals correctly answered both of these questions in the negative and held that the system is rationally related to the state's goal of local control.

B. EDUCATION IS NOT A FUNDAMENTAL RIGHT

Petitioners premise their argument that education is a fundamental right on the facts that education is a state

function, that it is important and that it is mentioned in the Texas Constitution. Both Petitioners and the trial court rely on the federal constitutional tests of "whether there is a right to education explicitly guaranteed by the Constitution," (San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1919, 1297 [1973]); and "we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein," (Plyler v. Doe, 457 U.S. 202, 218 n.15, 102 S.Ct. 2382, 2395 n.15 [1982]). (Tr. Vol. III, p. 540). The Texas Constitution, unlike the U.S. Constitution which delegates limited authority and power, addresses a great number of subjects that are not fundamental rights. The court of appeals, therefore, correctly focused its attention on the test established by our Texas Supreme Court for the Texas Constitution, that "fundamental rights have their genesis in the express and implied protections of personal liberty recognized in federal and state constitutions such as the right to free speech or free exercise of religion." Spring Branch Independent School District v. Stamos, 695 S.W.2d 556, 560 (Tex. 1985).

Nevertheless, regardless of the test applied, education is not a fundamental right under either the Texas or the United States Constitution, and the courts have so held. On the federal level, the issue was decided by San Antonio Independent School District v. Rodriguez, in which the Court dealt with the majority of the arguments set forth by Petitioners and still found that education was not a fundamental right. In particular, the

Rodriguez Court addressed the issue of the importance of education and its relationship to other rights which are guaranteed by the Constitution by stating:

> It is Appellees' contention however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote....Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.
>
> A similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter.

San Antonio Independent School District v. Rodriguez, 411 U.S. at 35, 93 S.Ct. at 1298. To this argument the Court replied:

> We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizen the most effective speech or the most informed electoral choice. That these may be desirable goals of the system of freedom of expression and that a representative form of government is not to be doubted. These are indeed goals to be pursued by people whose thoughts and beliefs are free from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

San Antonio Independent School District v. Rodriquez, 411 U.S. at 35, 93 S.Ct. at 1298. This argument set forth and rejected in Rodriquez is the "nexus" theory which formed the basis for most of the out-of-state opinions relied on by Petitioners. The Third Court of Appeals correctly recognized that our courts have not adopted the "nexus" theory.

Answering a challenge under both the state and federal constitutions, Hernandez v. Houston Independent School District, 558 S.W.2d 121 (Tex. Civ. App. - Austin 1977, writ ref'd n.r.e.) held that a tuition-free education was not a fundamental right requiring the application of strict judicial scrutiny to Section 21.031 of the Texas Education Code (1975) which restricted a tuition-free public school education to children who are citizens or legally admitted aliens. Section 21.031 of the Education Code was later overruled by the U.S. Supreme Court in Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1982). The Plyler Court did not find a fundamental right to education, but applied an intermediate level of scrutiny since it found the convergence of a complete denial of an important government service to a classification based on alienage. However, even the convergence of these two factors did not require a "compelling" state interest test, as advocated by Petitioners. Classifications such as alienage are not suspect classifications but have come to be known as "quasi-suspect" calling for a more exacting standard of judicial review than is normally accorded legislation under the rational basis analysis. See City of Cleburne v. Cleburne Living

Center, 473 U.S. 432, 105 S.Ct. 3249 (1985). Unlike the Plyler case, the present case does not involve a complete denial of a benefit or a quasi-suspect classification; therefore, there is no justification for even an intermediate level of review -- a concept which Texas courts have yet to adopt.

In Rodriguez v. Ysleta Independent School District, 663 S.W.2d 554 (Tex. Civ. App. - El Paso 1983, no writ) the court was confronted with a federal and state constitutional challenge to a school district's regulation regarding residence requirements passed pursuant to the provisions of Section 21.031 of the Texas Education Code. Although specifically asked to apply a compelling state interest test, the court only applied a rational basis test and upheld the school district's regulation.

Petitioners rely heavily on the statement in Stout v. Grand Prairie Independent School District, 733 S.W.2d 290 (Tex. App. - Dallas 1987, writ ref'd n.r.e., cert. den. _____ U.S. _____, 108 S.Ct. 1082 (1988) that "public education is a fundamental right guaranteed by the Texas Constitution." This statement is dicta in the case and an aberration from the remainder of the opinion. The issue in that case was the constitutionality of Section 21.912(b) of the Texas Education Code dealing with immunity from damages for teachers. That statute was attacked as being repugnant to both the equal protection clause of the Texas Constitution and to the open courts provision found in art. I, § 13 of the Texas Constitution. To determine whether or not a statute contravenes the open courts provision, a balancing test

is used. The legislative basis of a statute which foreclosed entry to the courts is weighed against the litigant's right to redress. The Stout case determined that protecting teachers from tort liability effects a broader purpose, based on the importance of public education to the entire state, and, therefore, outweighs the citizen's right to redress for tort. It was within that context that the statement that public education is a fundamental right was made. The court offered no supporting authority for its statement, nor was it necessary to the decision to make such a determination. It is clear from the remainder of the decision that the court did not intend this statement within the due process or equal protection context. The court was fully aware of the necessity of applying strict scrutiny and finding a compelling legislative purpose when dealing with a fundamental right, having cited both the Spring Branch decision and the Bynum decision in the text of its opinion. Yet, the court applied the rational basis test to both the due process and the equal protection analysis. In regard to due process, the Stout court held:

> We hold that the legislative basis for § 21.912(b) is rationally related to the goals sought to be achieved by the legislature, and that those goals outweigh the limitations on the right to redress under the open court's provision of the Texas constitution. Accordingly, we hold that § 21.912(b) of the Texas Education Code does not violate Article I, § 19 and Article I, § 13 of the Texas constitution, nor does it violate the due process clause of the fourteenth amendment of the United States Constitution. (Emphasis added)

Stout v. Grand Prairie Independent School District, 733 S.W.2d at 294, 295. In regard to the equal protection claim the court held:

> We hold that the disparate treatment of tort claimants injured by a public teacher's negligence is rationally related to the legislative goal of ensuring the continuing availability of quality public education. Accordingly we hold that § 21.912(b) does not violate Article I, § 3 of the Texas constitution, nor does it violate the equal protection clause of the fourteenth amendment of the United States Constitution. (Emphasis added)

Stout v. Grand Prairie Independent School District, 733 S.W.2d at 295. Clearly, the court's comment regarding education was not intended as establishing a fundamental right that requires strict scrutiny. The opinion makes both its understanding of the law and its application of the same quite clear.

An analysis of the history of the Texas constitutional provisions, including the educational provisions, as well as an analysis of the Texas Constitution itself supports a finding that education, albeit important, is not a fundamental right under the Texas Constitution. Unlike the United States Constitution, which is essentially a limitation of governmental authority, the Texas Constitution is a grant of authority. In fact, almost the entire system of Texas government with its essential components is contained in the Texas Constitution. The state's system of roads and bridges (Texas Constitution art. XVI, § 24) and the state's system of hospital districts (Texas Constitution art. IX, §§ 4-11) are both contained in the Constitution and are certainly

important, if not essential, to the people of the State of Texas, yet none of these can be said to be fundamental rights of the people; rather, they are delegations of authority to the Legislature.

The language of art. VII, § 1 is also clearly a delegation and delineation of authority and a mandate to the Legislature rather than a guarantee to the people. It states that "it shall be the duty of the Legislature of the State to establish and make suitable provisions for the support and maintenance of an efficient system of public free schools." Whereas, rights of the people are written in terms of guarantees to them in the Texas Constitution, for example:

> Article I, § 3.
> All free men, when they form a social compact, shall have equal rights...
>
> Article I, § 6.
> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience...
>
> Article I, § 8.
> Every person shall be at liberty to speak, write or publish his opinion on a subject, ...
>
> Article I, § 9.
> The people shall be secure in their persons...
>
> Article I, § 10.
> In all criminal prosecutions, the accused shall have a speedy public trial by an impartial jury.
>
> Article I, § 11.
> All prisoners shall be bailable by sufficient sureties...

Article I, § 17.
No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, ...

Article VI, § 2.
Every person subject to none of the foregoing disqualifications... shall be deemed a qualified elector; ...

These are examples of rights dedicated and guaranteed to the people. Article VII of the Texas Constitution dealing with education is addressed to the Legislature, just like the majority of the provisions in the Texas Constitution. And, most important, as the court of appeals pointed out, the term "fundamental right" refers to a limitation upon an exercise of government power to curtail that right; it does not imply an affirmative obligation on the part of the government to ensure that the financial resources are available to exercise that right or that that right is exercised by the individual in any manner.

Petitioners urge this court to rely on the decisions of courts in other states. However, they pick and choose their decisions carefully ignoring those most similar to the present case. For example, the State of Oklahoma, our neighbor to the north, just recently grappled with the identical issue. Its constitution, like ours, addresses many areas which could have been left to statutory enactment. Article I, Sec. 5 of the Oklahoma Constitution provides that "provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all children of the state." Also, art.

XIII, § 1 provides that "the Legislature shall establish and maintain a system of free public schools wherein all children of the state may be educated." Based on these provisions, the State of Oklahoma established a system similar to the one in Texas whereby the public schools of the state are supported by state revenues and by local revenues based on local ad valorem property taxes imposed by the local school districts. As the Oklahoma Supreme Court found, in this system "the amount of the revenue varies greatly among the school districts" because of the differences in property wealth and that "these differences greatly affect the amount of revenue per pupil which each district can raise for the support of its schools." Fair School Finance Counsel of Oklahoma, Inc., et al. v. State of Oklahoma, et al., 746 P.2d 1135 (Okla. 1987).

Like the present case, the plaintiffs in that case urged that education was a fundamental right under the Rodriguez analysis because it appeared in the Oklahoma Constitution. The Oklahoma Supreme Court rejected the Rodriguez argument as inappropriate because of the structure of the Oklahoma Constitution and held that education was not a fundamental right. In regard to its appearing in the constitution, the court stated:

> These sections merely mandate action by the Legislature to establish and maintain a system of free public schools. They do not on their face guarantee equal expenditures per pupil.

Fair School Finance Counsel of Oklahoma, Inc. v. State of Oklahoma, 746 P.2d at 1149.

The Oklahoma Supreme Court went on to hold that the system of financing public education in the State of Oklahoma passed muster under both the fourteenth amendment to the United States Constitution and the Oklahoma Constitution.

Oregon is another state that has rejected education as a fundamental right. In Olsen v. State, 554 P.2d 139 (Ore. 1976), the court held that education was not a fundamental right even though an entire article (art. VIII) of the Oregon Constitution was devoted entirely to the state's public school system. The court discussed the fact that the Oregon Constitution was one in which many laws which are usually considered legislation are inserted in the Constitution. The court stated:

> For example, Article I, § 19 of the Oregon Constitution, Oregon's Bill of Rights, provides that it is a guaranteed constitutional right to sell and serve intoxicating liquor by the drink. According to the analysis of Rodriguez this would make the right a fundamental interest.

Olsen v. State, 554 P.2d at 144.

Art. IX, § 2 of the Colorado Constitution requires the General Assembly to "provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state." The financing system is also, like Texas, a mixture of state support and locally generated taxes. The Supreme Court of Colorado in the En Banc decision of Lujan v. Colorado State Board of Education, 649 P.2d 1005 (Colo. 1982), determined that education was not a fundamental right under the Colorado Constitution. The court rejected the

Rodriguez test because of the differences between the U.S. Constitution, as one of restricted authority and delegated powers, and the Colorado Constitution which does not restrict itself to addressing only those areas deemed fundamental. That court stated:

> Rather, it contains provisions which are both equally suited for statutory enactment, e.g., Mining and Irrigation, Colo. Const., Art. XVI, and Nuclear Detonations, Colo. Const., Art. XXVI; as well as those deemed fundamental to our concept of ordered liberty, e.g., Freedom of Elections, Colo. Const., Art. II, § 5.
>
> . . .
>
> On its face Art. IX, § 2 of the Colorado Constitution merely mandates action by the General Assembly -- it does not establish education as a fundamental right, and it does not require that the General Assembly establish a central public finance system restricting each school district to equal expenditures per student.

The court went on to note the importance of education and even acknowledged that a democratic society may benefit to a greater degree from a public school system in which school districts expend the exact dollar amounts per student; but the court still felt these considerations and goals properly lie within the legislative domain. Lujan v. Colorado State Board of Education, 647 P.2d at 1018.

Respondents do not denigrate the importance of education. But, importance is not the test either under federal standards enunciated in Rodriguez or under the Texas standard enunciated in Spring Branch Independent School District v. Stamos. The right

to practice the profession of teaching, although vitally important as a means of earning a living, was just held by our Texas Supreme Court not to be a fundamental right. State v. Project Principle, Inc., 724 S.W.2d 387, 391 (Tex. 1987).

The standard articulated in Spring Branch Independent School District v. Stamos is more appropriate to an analysis under the Texas Constitution. Such a restriction to the protection of personal liberty is workable and in keeping with the layout of the Texas Constitution which contains a "Bill of Rights" in the first article of the Constitution. At the end of this enumeration of rights, art. I, § 29 provides:

> To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the several powers of government, and shall forever remain inviolate, ...

Education is not included within the Bill of Rights; it could have been, but it wasn't.

Respondents would respectfully submit that art. VII, § 1, like so much of the Texas Constitution, is a grant of power to the Legislature imposing a mandatory duty on it, rather than the setting forth of a fundamental right guaranteed to the people. See Bowman v. Lumberton Independent School District, 32 Tex. Sup. Ct. J. 104 (December 7, 1988); see Mumme v. Marrs, 40 S.W.2d 31 (Tex. 1931).

C. WEALTH IS NOT A SUSPECT CLASSIFICATION

This case suffers from the same disability as the purported class in San Antonio Independent School District v. Rodriguez -- i.e., the lack of an identifiable class. Although the trial court made extensive findings, nowhere did it define the class involved. Is the class composed of poor people statewide, poor people who reside in poor school districts, poor people who reside in wealthy school districts or all students who reside in low wealth school districts? The court did not define its class. The findings of fact were couched in terms of all of the foregoing possible class definitions. However, an even more fundamental problem is that any possible class definition in this case did not meet the distinguishing criteria set forth in San Antonio Independent School District for a class to be suspect. The Court formulated the test as:

> The precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.

San Antonio Independent School District v. Rodriguez, 411 U.S. at 20, 93 S.Ct. at 1290.

The argument put forth in Rodriguez was the identical argument being put forth by Petitioners herein, to which the Court answered as follows:

> Second, neither Appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality of education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to Appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense.

San Antonio Independent School District v. Rodriguez, 411 U.S. at 24, 93 S.Ct. at 1291.

The Court went on to distinguish the facts before it from a situation in which elementary and secondary education would only be made available by the state to those who could pay a tuition for that service. In that event, there would be a clearly defined class of "poor" people -- definable in terms of their inability to pay the prescribed sum -- who would be absolutely precluded from receiving an education. The Court also found that Texas had provided "an adequate base education for all children." And, this was found by the Court as the system existed before the

passage of House Bill 72. San Antonio v. Rodriquez, 411 U.S. at 24, n.60, 93 S.Ct. at 1292, n.60.

The State of Texas has had disparity of wealth amongst its people since the inception of the public education system. Mumme v. Marrs, 40 S.W.2d 31 (Tex. 1931). Poor people are not the "discreet, insular minority" referred to in United States v. Carolene Products, 304 U.S. 144, 158, n.4, 58 S.Ct. 778, 783 n.4 (1938). Rather, they are the "large, diverse, and amorphous class" described in Rodriquez. Also, like Rodriquez, all of the poor students are not concentrated in the poorest districts. They are spread throughout the school districts in the State of Texas.

The same argument, that wealth within a system of school financing constitutes a suspect class, was also rejected in Lujan v. Colorado State Board of Education, 649 P.2d 1005 (Col. 1982).

It is respectfully submitted that the court of appeals in this case was correct in rejecting wealth as a suspect classification.

D. THE TEXAS SCHOOL FINANCE SYSTEM SATISFIES RATIONAL BASIS ANALYSIS

The beginning point for any analysis of a statute's constitutionality under the rational basis test is a presumption in favor of the constitutionality and placing the burden on the party attacking the constitutionality. Whitworth v. Bynum, 699

S.W.2d 194, 197 (1975); Spring Branch Independent School District v. Stamos, 695 S.W.2d 556, 558 (Tex. 1985).

Equal protection analysis requires that the classification created by the state be rationally related to a legitimate state interest. Sullivan v. University Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981); Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985); Spring Branch Independent School District v. Stamos, 695 S.W.2d 556, 559 (Tex. 1985). In other words, similarly situated individuals must be treated equally unless there is a rational basis for not doing so. Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985).

Petitioners' argument that the Third Court of Appeals applied the wrong standard for rational basis analysis is completely unfounded. The court of appeals discussed the presumption of constitutionality and stated that "such presumption may not be disturbed unless the public school finance system bears no rational relationship to any legitimate state purpose." (Slip Opinion p.9). The court of appeals stated explicitly that it was relying on the Whitworth v. Bynum and the Spring Branch Independent School District v. Stamos decisions. Petitioners focus entirely on the Third Court of Appeals' quotation from Hernandez v. Houston Independent School District and then argue that the court of appeals used the wrong standard because the Bynum decision expanded the equal protection analysis. Petitioners completely ignore the court of appeals'

analysis and reference to Bynum and Stamos. The Hernandez decision was but one consideration in the court's decision.

Petitioner Edgewood's argument that the Hernandez case was overruled by this court because it was cited by the Third Court of Appeals in the Sullivan v. University Interscholastic League decision, which was later overruled by this court, has no basis whatsoever in law. This court overruled the Third Court of Appeals decision in Sullivan on its application of the rational basis standard to the facts of the case, not on use of an improper standard per se. Therefore, there is no plausible argument that when this court overruled the Sullivan decision, it also overruled the Hernandez decision.

The trial court's conclusion that equal protection demands a total equality of access to funds by each and every student flies in the face of basis equal protection analysis. It is fundamental to the analysis that differences can exist and the analysis is directed at the differences. Equal protection does not entitle every citizen to receive equal benefits each time government money is spent. This is a longstanding rule which was first asserted by the Texas Supreme Court in 1882 in Norris v. City of Waco, 37 Tex. 635, it was relied on and quoted in Carter v. Hamlin Hospital District, 538 S.W.2d 671 (Tex. Civ. App. - Eastland 1976, writ ref'd n.r.e.), cert. den'd, 430 U.S. 984, 97 S.Ct. 1680 (1977):

> To hold that each person must receive the same benefit as another may from the expenditure of money raised by taxation would be to

> hold that the law required an impossibility, for, in the very nature of things, some persons will draw a greater pecuniary benefit from the expenditure of money for strictly public purposes than will others. In fact, some may receive no benefit whatever, save such as results to them from the preservation of order, protection to property, and the general prosperity which results therefrom, while others may and will be directly benefited by the increased value of their property and increase to their business which results from the expenditure of money raised by taxation, for purposes in every respect strictly public.

Carter, 538 S.W.2d at 675.

As stated by the court in Weber v. City of Sachse, 591 S.W.2d 563, 567 (Tex. Civ. App. - Dallas 1979, no writ) "such a standard would make almost all government spending programs unconstitutional."

Historically, Texas has had a system of education financed through a combination of state funds and local district taxes. And, since its inception, the state has recognized the existence of variances in property wealth of different districts and has taken this factor into consideration in the distribution of state revenues. There has been a continuing balancing act in state funding based on the school districts' local revenues. The most significant reform came in 1984 under House Bill 72, which was characterized by Dr. Richard Hooker, the Petitioner's primary expert, as "the most comprehensive reform bill passed in the United States by any state." (S.F. Vol. I, p. 52). The Foundation School Program, codified in chapter 16 of the Texas Education Code, establishes a system to distribute the available state

aid, on the basis of a sliding scale of revenues giving the greatest help to the poorest districts. The effect of House Bill 72 is to equalize the disparities of wealth sufficiently so that the school districts in Texas do have sufficient funds to provide for the basic state required programs to maintain accreditation as a school district in the State of Texas. This is the system of financing under attack in this case.

The Petitioners in the trial court attempted to analyze the state finance system by comparisons of extremes within the entire spectrum without following any of the methods advocated by the experts in the field of school equity analysis. (Tr. Vol. III, pp. 549-558). Experts recommend that any equity analysis be made with a disregard of certain percentages (from 2% to 10%) at each end, top and bottom, of the statistical array being studied to get an accurate picture of the system as a whole. They maintain that use of the extremes -- i.e., the statistical outliers -- distort the overall picture. (S.F. Vol. V, pp. 614, 621-628). The state presented a study of the entire Texas School Finance System done by Dr. Deborah Verstegen. She conducted an analysis of the system using all of the accepted methods of measuring equity in a system and presented the results to the court showing that Texas is within the nationally accepted ranges of financial equity. (Def. Ex. No. 42; S.F. Vol. XXIV, pp. 4190-4603). The trial court totally ignored the Verstegen report without any

findings in regard to the methodology used or the credibility of the testimony.

Article VII, § 3 of the Texas Constitution authorizes the Legislature to implement a system of school districts with corresponding taxing power within the school district. On its face art. VII, sec. 3, and the historical analysis of this provision of the Constitution, shows a desire for local control in the educational process. This is achieved through the establishment of local school districts and local taxation. It is up to the citizens of each district to establish to what degree they wish to tax themselves and what those tax dollars shall be spent on.

The legitimacy of local control as a rationale for the Texas School Finance System has been adjudicated by the Texas Supreme Court in Mumme v. Marrs, 40 S.W.2d 31 (Tex. 1931), and by the United States Supreme Court in San Antonio v. Rodriguez.

In Mumme v. Marrs, the sole question involved was the constitutionality of the Rural Aid Appropriation Act for the biennium beginning September 1, 1929. The object of the act was "equalizing the educational opportunities afforded by the state to all children of scholastic age living in small and financially weak school districts." Mumme v. Marrs, 40 S.W.2d at 32. The court found that the act classifies the schools of the state into basically two classes: "small and financially weak school districts, and those which are not so small and weak financially as

to need aid to bring their schools up to the average standard of education afforded by our system." Mumme v. Marrs, 40 S.W.2d at 36.

The court acknowledged an inherent difference in school districts describing the type of school districts which any community can have as being dependent upon "the population of the community, the productivity of the soil, and generally its taxable wealth." Mumme v. Marrs, 40 S.W.2d at 36. The purpose of the Rural Aid Appropriation Act was to relieve these inequalities and the court tested the purpose and effect of the act against what is currently referred to as the rational basis standard. The court held that the Act, as it operated in conjunction with other provisions (including local district taxes of differing and inequitable amounts) of the then existing Texas system of financing education to be neither discriminatory, arbitrary, or unreasonable. Mumme v. Marrs, 40 S.W.2d at 37.

San Antonio v. Rodriguez analyzed local control as the justification for the system that results in different levels of per-pupil expenditure and found it to be a rational justification for the Texas system as it existed at that time. In fact, the court not only recognized local control as a justification, but as an important one, by stating:

> While assuring a basic education for every child in the State, it permits and encourages a large measure of participation and control in each district's schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of

> responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and descenting opinions in Wright v. Council of the City of Emporia, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed.2d (1972). Mr. Justice Stewart stated there that 'direct control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society.' Id., at 469, 92 S.Ct. at 2206.
>
> . . .
>
> The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how those local tax dollars will be spent.

San Antonio Independent School District v. Rodriguez, 411 U.S. at 49, 93 S.Ct. at 1305.

Petitioners herein, make the same argument that they did in San Antonio, that the poorer school districts have less fiscal flexibility and therefore less local control than the richer districts. The Court dispensed with this argument by stating that the existence of some inequality in the manner in which the state's rationale is achieved is not alone a sufficient basis for striking down the entire system. The Court went on to note that even "those districts that have reduced ability to make free decisions with respect to how much they spend on education still retain under the present system a large measure of authority as to how those available funds will be allocated. They further

enjoy the power to make numerous other decisions with respect to the operation of the schools." San Antonio Independent School District, 411 U.S. at 51, 98 S.Ct. at 1306.

The concept of a desire for local control is not an abstract judicial theory. Its exercise is reflected in the testimony in this case. Petitioner Socorro Independent School District elected to spend its dollars for a new administration building that won a prize. This option was selected by the local citizenry even though the elementary school was in bad shape. (Def. Int. Ex. Nos. 5, 6, 7, and 8; S. F. Vol. III, p. 393). Mrs. Padilla, whose children attend the Socorro Independent School District, hoped that any additional money would produce a swimming pool for the school district. (S. F. Vol. III, p. 355). Obviously, Socorro Independent School District and its citizens considered the administration building to be important and to help meet the educational needs of the community. This is what local control is all about -- the right to raise or lower your own taxes and the right to direct their expenditures to meet the perceived needs of the citizenry. The superintendents and individuals testifying on behalf of their respective districts repudiated any concept of consolidation or change in their own school boundaries. (S.F. Vol. XII, p. 2167, S.F. Vol. XV, p. 2806).

The court of appeals correctly reviewed the role and goal of local control within the Texas school system and found it to be a legitimate goal and one which is rationally related to the Texas School Finance System as it exists today. The bottom line is

that the citizen of the local school district still influences and participates in the decision-making process as to how much he will tax himself and how those local dollars are spent. (Slip Opinion, p. 10).

E. EQUALITY OF FUNDS DOES NOT RESULT IN EQUALITY OF EDUCATION

The trial court set forth a new and unique interpretation that the equal protection clause of the Texas Constitution required that each student should have equal access to funds. (Tr. Vol. III, pp. 502 and 538). If, arguendo, there is a fundamental right, it is to education, not to money. In arriving at this theory, the trial court did not feel itself compelled to establish whether there was a relationship between educational expenditures and actual learning by students as measured by academics tests such as the TEAMS test used in this state. Such a concept was relegated to "educational theory," which the court was not called on to resolve under its view of the case. (Tr. Vol. III, p. 538). This posture conveniently allowed the trial court to totally disregard the testimony of Dr. Herbert Walberg, one of the nation's best known educational experts, that the expenditure of additional funds does not translate into more education. (S.F. Vol. XXX, p. 5382). His theory is borne out by a comparison of the dollar expenditures to the educational output as measured by the TEAMS scores of the school district, contained

in Bench Marks, a report by the Texas Research League (Pl. Ex. No. 205). The following is a composite of some of the pages of Bench Marks (the last column indicates the page in Pl. Ex. No. 205 on which the information is found), showing, among other matters, the ADA (Average Daily Attendance), Total Current Operating Expense per ADA and TEAMS scores for some of the Petitioner and Respondent school districts:

DISTRICT	STUDENTS (ADA) 84-85 (1)	TOTAL CUR. OP. EXPENSE (10)	OCT. 1985 TEAMS TEST NATIONAL PERCENTILE RANK MATH (25)	READING (26)	WRITING (27)	1985 MKT. VALUE PER ADA (28)	1985 TAX RATE TOTAL (31)	PAGE
CARROLL ISD	1157	2597.12	75	66	69	334496	$ .810	A-32
CARROLLTON FARMERS	12690	3711.27	65	56	56	542245	$ .679	A-26
COPPELL ISD	1245	4716.33	74	57	64	1154120	$ .780	A-26
CROWLEY ISD	3037	3038.96	58	57	59	338940	$1.040	A-29
DALLAS ISD	117764	3545.80	38	32	37	443998	$ .652	A-26
DE SOTO ISD	4158	2995.26	69	61	58	185957	$ .975	A-26
DUNCANVILLE ISD	8135	2872.00	63	57	61	216781	$ .903	A-26
HOUSTON ISD	166867	3589.99	50	42	46	376978	$ .683	A-14
LANCASTER ISD	3190	3031.22	46	39	47	223013	$1.062	A-26
LEWISVILLE ISD	12934	3056.53	63	55	54	213546	$ .940	A-29
MIDWAY ISD	3731	2600.82	71	65	66	238262	$ .765	A-32
PLANO ISD	25021	3461.89	80	69	69	379841	$ .767	A-26
RICHARDSON ISD	31126	3764.32	79	67	69	406574	$ .959	A-26
SUNNYVALE ISD	277	3466.86	0	0	0	540352	$ .680	A-26
EDGEWOOD ISD	14599	3600.58	31	26	30	38661	$ .653	A-50
HICO ISD	427	3324.55	66	53	59	101983	$ .683	A-32
LASARA ISD	213	4708.32	0	0	0	158596	$ .730	A-8
SOCORRO ISD	6746	3151.07	31	31	31	77255	$ .750	A-50
STAR ISD	62	6423.44	38	68	49	173724	$1.120	A-35

These figures demonstrate that equal funds do not mean equal education. For example, Petitioner Edgewood spent ($3,600.58)

1.38 times as did Respondent Midway with an expenditure of $2,600.82 per student, while producing less than half the measured educational results in Math, Reading, and Writing. The total score for Edgewood in the three areas was 87 while Midway's total score was 202 or 2.32 times as educationally productive. Even Petitioner Socorro, with an expenditure of only 87.5% ($3,151.07) of Edgewood's ($3,600.58) expenditures had a total of 93 on the scores and was more productive than Edgewood. Plano Independent School District, with an expenditure of only 96% ($3,461.89) of that of Edgewood ($3,600.58), produced total scores of 218, which was 2.5 times more total measured education than Edgewood.

The statistics go on to show that both the Dallas Independent School District and the Houston Independent School District spent less per ADA than Edgewood did, but produced more measured education, and Socorro Independent School District, which spent $449.00 less per student than Edgewood did, but did better on the test scores than Edgewood. On Reading, Socorro scored 31 to Edgewood's 26. In Writing, Socorro scored 31 while Edgewood only scored 30. They tied in Math.

The average expenditure per student in the State of Texas for the school year 1985-86 was $3,346.00 per student. (Pl. Ex. No. 205 at p. 1). Twenty (20) of the total sixty-nine (69) Petitioner school districts spent above the state average. (Blanket I.S.D. at $3,770.85, Chilton I.S.D. at $3,839.97, Crystal City I.S.D. at $3,907.56, Edgewood I.S.D. at $3,600.58,

Farwell I.S.D. at $4,080.64, Goldthwaite I.S.D. at $3,415.92, Harlandale I.S.D. at $3,353.59, Jim Hogg County I.S.D. at $4,146.26, Hutto I.S.D. at $3,464.07, Kenedy I.S.D. at $3,404.73, La Joya I.S.D. at $3,759.28, Lasara I.S.D. at $4,708.32, Lyford I.S.D. at $3,790.94, Pharr-San Juan Alamo I.S.D. at $3,393.30, Progresso I.S.D. at $3,691.47, Rio Grande City I.S.D. at $3,745.35, San Antonio I.S.D. at $3,554.16, San Elizario I.S.D. at $3,851.23, Santa Maria I.S.D. at $4,318.27, and Star I.S.D. at $6,423.44). Twelve of these districts spent above Carrollton-Farmers Branch I.S.D. at $3,711.27 per ADA and Richardson at $3,764.32 per ADA. Three of the Petitioner school districts even outspent Highland Park's $4,178.39 per ADA. (Lasara, $4,708.32; Santa Maria, $4,318.27; and Star, $6,423.44).

Contrary to the court's findings, these expenditures were not a direct corollary of property values. (Tr. Vol. III, p. 555). The property value at Carrollton-Farmers Branch was $542,245.00 per ADA and the expenditure was $3,711.27 per ADA; however, Edgewood, which spent almost the same per ADA, had a property value of only $38,661.00 per ADA -- less than 10% of Carrollton-Farmers Branch's property value. Edgewood's tax rate was .65 cents while the tax rate for Carrollton-Farmers Branch was .67 cents -- .02 cents higher than Edgewood. So where did the money come from? Edgewood receives its money through the sliding scale of state funds which increase as property values decrease to compensate for the loss of revenues to the local districts from decreases in property values. Other comparisons

also refute Dr. Hooker's thesis of tax low -- spend high and tax high -- spend low. For example, Richardson has $406,574.00 per ADA, which is about ten times more than Edgewood, yet its tax rate at .95 cents to Edgewood's .65 cents is one-third higher. Richardson only spends $164.00 per student more than Edgewood. Likewise, Plano has $379,841.00 per ADA with a tax rate of .76 cents but only spends $131.00 per student more than Edgewood.

In San Antonio Independent School District, the Court found that the question of whether the quality of education may be determined by the amount of money expended for it was an "unsettled and disputed question"; while Petitioners and the trial court in this case simply ignore this issue.

REPLY POINT NO. 4 (RESTATED)

THE COURT OF APPEALS PROPERLY ASSESSED THE ROLE OF SCHOOL DISTRICTS WITHIN THE CONSTITUTIONAL FRAMEWORK OF THE TEXAS SCHOOL FINANCE SYSTEM (Germane to Petitioner Edgewood's Points of Error No. 1, 2, 3, 4, 5, 7, 9, and 10, and to Petitioner Alvarado's Points of Error No. 1, 2, 3, 4, and 5)

STATEMENT, ARGUMENT AND AUTHORITIES UNDER REPLY POINT NO. 4

> The school district has been the basis of the public school system of Texas from the days of the Republic to the present time, as evidenced by Constitutional provisions, statutes, and judicial opinion.

Love v. City of Dallas, 40 S.W.2d 20, 24 (Tex. 1931).

Authority for existence of school districts in Texas is found in art. VII, § 3 of the Texas Constitution which provides:

> ...and the Legislature may also privide for the formation of school districts by general laws; and all such districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties; and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, and for the further maintenance of public free schools, and for the erection and equipment of school buildings therein;

Pursuant to this constitutional authority, the Legislature has provided for the formation of school districts and independent school districts in the State of Texas. Under the constitutional authorization, the Legislature could have directly created school districts; however, the Legislature chose to delegate this part of its legislative power to the qualified voters of the State of Texas. The creation and formation of school districts, and their boundaries, are as a result of action by the electorate. This is a valid delegation of legislative power. School districts are quasi-public corporations and are of the same general character as municipal corporations. Love v. Dallas, 40 S.W.2d 20 (Tex. 1931).

School districts have constitutionally, by art. VII, § 3, been invested with the power to levy taxes within each school district for the further maintenance of public free schools and for the erection and equipment of the school buildings therein. Taxes raised by the school district belong to the school district, not the state, and are impressed with a specific purpose.

There is, however, no prohibition against the Legislature directly appropriating funds for capital improvements. The Texas Supreme Court addressed this specific issue in Love v. Dallas, 40 S.W.2d 20, 26 (Tex. 1931) by stating:

> The various constitutional and statutory provisions cited also show that taxes levied in school districts and cities for school purposes were and are levied for the benefit of the district or city, or the inhabitants thereof, and not for the school system of the state generally (emphasis added)
>
> . . .
>
> In view of the history of the subject and the statutory and constitutional provisions referred to above, it is plain, we think, that the property and funds of the public schools are held in trust by the city, district, county, or other statutory agency, to be used for the benefit of the school children of the community or district in which the properties exist, or to which the school funds have been allocated. We think these properties and funds are so plainly and clearly impressed with the trust in favor of the local public schools of the city or district that they are within the protective claims of both the state and federal constitutions, and that the Legislature is without power to devote them to any other purpose or to the use of any other beneficiary or beneficiaries. (emphasis added)

The Love decision went on to note that no matter how plenary the powers of the Legislature may be over municipal and quasi-municipal corporations, there are well recognized limitations, of which this is one. The trial court's finding that all school taxes are state taxes flies directly in the face of art. VIII, § 3 and art. VIII, § 1e which prohibits the levying of a state ad valorem tax. (Tr. Vol. III, p. 548). Article VII, § 3

by necessity contemplates a differential in ability to raise money between the school districts created thereunder. In fact, art. VII, § 3, as it existed from 1883 to 1915, actually precluded any form of equalization aid from the Legislature. Mumme v. Marrs, 40 S.W.2d 31, 34 (Tex. 1931). The trial court's quarrel is with the Constitution, not with the legislation enacted thereunder.

Establishment of boundary lines has been delegated by the Legislature to the voters of the State of Texas. A holding by the trial court that the boundary lines of the school districts of the State of Texas are irrational is a holding that delegation of power to the voters of the State of Texas is an irrational act and that the votes cast by the citizens of the State of Texas are irrational votes. Establishment of boundaries of independent school districts in the State of Texas is a continuous living and dynamic process which is responsive to the needs and desires of the local citizenry. The procedure to change the boundaries of a school district are found in chapter 19 of the Texas Education Code which provides for the creation, consolidation, and abolition of school districts.

Territorial boundaries may be changed by either consolidation or annexation and deannexation of territory. The procedure set forth in chapter 19 involves variations on the steps of a petition with a requested action, an election held by the voters of the school district, action by the commissioners court of the county in which the school district and action by the board of

trustees of the school district. For example, consolidation may be effectuated between school districts so long as they have contiguous territory. The procedure is initiated by a petition signed by the registered voters of the school districts involved and the petition is presented to the county judge of the county in which the school districts are located. The judge then orders an election to be held on the issue of consolidation. Section 19.052 et seq., Texas Education Code. Annexation and deannexation of territory follows essentially the same procedure and requires the approval of the board of trustees of the school district whose territory is involved. Section 19.021 et seq., Texas Education Code. School district boundaries are justiciable on an individual basis. However, motivation of the voters, such as a desire to escape a higher tax rate, is not justiciable. Central Education Agency of the State of Texas, et al. v. Upshur County Commissioners Court, 731 S.W.2d 559 (Tex. 1987). Nor do such financial issues present constitutional problems under the Equal Protection clause. In Carter, et al. v. Hamlin Hospital District, et al., 538 S.W.2d 671 (Tex. Civ. App. - Eastland 1976, writ ref'd. n.r.e., cert. den. 430 U.S. 984, 97 S.Ct. 1680 (1977) the Court approved the statute authorizing the creation of a hospital district and authorizing taxation within its boundaries. The district was created, and its boundaries established by election. The Court held such a procedure to be a political function not subject to judicial review by stating:

> Plaintiffs' contention that the Act is unreasonable and arbitrary because they were included within the boundaries of the district for the purpose only of acquiring additional revenue and that they would receive no benefit from the district, does not present a justiciable matter under the Equal Protection clause of the fourteenth amendment.

Carter v. Hamlin Hospital District, 538 S.W.2d at 675.

Review of boundary decisions commences with the commissioners court of the county, and may be appealed to the Texas Education Agency. Section 19.009 TEX. ED. CODE. After that, an appeal may be had to the District Court in Travis County. TEX. REV. CIV. STAT. ART. 6252-§ 19. There is no statutory or constitutional authorization for wholesale redistribution of territory and redrawing of boundaries of school districts in the State of Texas. The Upshur County case specifically upheld this legislative delegation of decision making authority to the local level. And, one cannot presume that the voters and the elected members of the Commissioners Court are irrational.

Differences in both taxable value of property and tax rate between taxing authorities, whether they be cities, counties, or school districts, is a well recognized concept which does not offend the equal taxation guarantee found in art. VIII, § 7 of the Texas Constitution or the Equal Protection clause of the Texas or U.S. Constitution. So long as the tax is uniform within the taxing district, there is no constitutional violation. Wheeler v. City of Brownsville, 220 S.W.2d 457 (Tex. 1949); Smith v. Davis, 426 S.W.2d 827 (Tex. 1968).

It is respectfully submitted that the delegation of authority to the voters of the State of Texas to establish the boundaries and the territorial limits of their school districts, and to levy the appropriate tax therein, is a constitutionally delegable authority. The trial court's attack on the boundaries is an attack on the Constitution itself and on the rationality of the people of the State of Texas.

REPLY POINT NO. 5 (RESTATED)

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THERE WAS NO BASIS IN THE DISTRICT COURT'S JUDGMENT FOR A DETERMINATION ON THE DUE COURSE OF LAW PROVISIONS. (Germane to Petitioner Edgewood's Point of Error No. 15 and to Petitioner Alvarado's Point of Error No. 7)

STATEMENT, ARGUMENT AND AUTHORITIES UNDER REPLY POINT NO. 5

The court of appeals correctly decided that the issue of whether the Texas School Finance System violates art. I, § 19, the due process of law provisions of the Texas Constitution, was not before it. The court of appeals was correct that there was no mention of the due course of law proceedings in the pleadings or in the trial court's findings of fact and conclusions of law. Furthermore, the issue was not tried by consensus since the first time it appears is in the trial court's judgment. The trial court's failure to make any findings in support of this portion of its judgment, after having been requested to do so, is reversible error. Allen Construction Company v. Soliz, 421 S.W.2d 423,

426 (Tex. Civ. App. - Austin 1967, err. dism'd.); Texas Rules of Civil Procedure, Rule 299. However, if this issue were before this court, it too has been resolved by the decision in Mumme v. Marrs, 40 S.W.2d at 35, which also involved a due process challenge under art. I, § 19 of the Texas Constitution and in which the court found no violation of either equal protection or due process.

REPLY POINT NO. 6 (RESTATED)

THE COURT OF APPEALS CORRECTLY REFUSED TO ASSESS ATTORNEYS' FEES AGAINST THE RESPONDENTS. (Germane to Petitioner Edgewood's Points of Error No. 17, 18, 19, and 20, and to Petitioner Alvarado's Point of Error No. 8)

STATEMENT, ARGUMENT AND AUTHORITIES UNDER REPLY POINT NO. 6

Since the court of appeals reversed the trial counrt and rendered judgment in favor of the Respondents and that Petitioners take nothing, it did not have to reach the issue of whether or not the trial court correctly held that Petitioners, even though winners in the trial court, could not recover their attorneys fees. There was no need to reach this issue. However, if this court were to reach that issue, then it should hold that the doctrine of sovereign immunity bars recovery of attorneys fees against the school districts. Barr v. Bernhard, 562 S.W.2d 844 (Tex. 1978).

Petitioners assert that attorneys' fees should be assessed against both the State and the school districts, relying on the holdings in Texas State Employees Union v. Texas Department of M.H.M.R., 746 S.W.2d 203 (Tex. 1987) and Camarena v. Texas Employment Commission, 754 S.W.2d 149 (Tex. 1988). Neither of those cases establish any authority for the assessment of attorneys' fees against the school districts. In Texas State Employees Union, the court granted attorneys' fees against the State under the theory that the State had waived its sovereign immunity with the provisions of TEX. CIV. PRAC. & REM. CODE §104.001, et seq. which specifically provide for the payment of attorneys' fees under specified circumstances including when the cause of action is for a deprivation of a right, privilege, or immunity secured by the U.S. and Texas Constitutions. In Camarena, the legislative authorization for the payment of attorneys' fees was contained in TEX. CIV. PRAC. & REM. CODE §106.001, et seq. There is no similar provision authorizing the payment of attorneys' fees by school districts. In fact, TEX. CIV. PRAC. & REM. CODE §102.002 limits the payment of attorneys' fees to situations resulting from an act or omission of any employee that gives rise to a cause of action for negligence. Clearly, this is not a negligence case.

Absent any legislative waiver, the doctrine of governmental immunity is still intact for school districts and the trial court

was without authority to make any such award of attorneys' fees against the school districts. Barr v. Bernhard, 562 S.W.2d 844 (Tex. 1978); Stout v. Grand Prairie Independent School District, 733 S.W.2d 290 (Tex. App. - Dallas 1987, writ ref'd n.r.e., cert. den. 108 S.Ct. 1082).

Additionally, the trial court held that an award of attorneys' fees against the Defendant-Intervenor school districts would be neither equitable nor just under the terms of the Declaratory Judgment Act. The court then declined to exercise its discretion to award any such attorneys' fees. (Tr. Vol. III, pp. 606-607). Participation by the Defendant-Intervenor school districts did no more to prolong the trial than participation by the Plaintiff-Intervenor school districts, whose standing to participate is even questionable.

WHEREFORE, PREMISES CONSIDERED, Respondents respectfully request this court to refuse the applications for writ of error; and in the alternative, if such applications be granted, Respondents request that the judgment of the Third Court of

Appeals be affirmed and for such other relief to which Respondents may show themselves justly entitled to receive.

Respectfully submitted,

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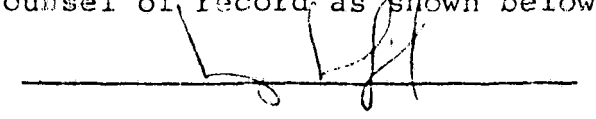
CERTIFICATE OF SERVICE

This is to certify that the foregoing Andrews Independent School District, et al.'s Brief in Response to Application for Writ of Error has been forwarded on this the 2nd day of March, 1989 to the following counsel of record as shown below:



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"brf/edgewood"(MM1)

C 8353

NO. C-8353

IN THE SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners/Plaintiffs,

V.

WILLIAM KIRBY, et al.,

Respondents/Defendants,
Defendant-Intervenors.

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REPLY BRIEF OF PETITIONERS EDGEWOOD INDEPENDENT SCHOOL DISTRICT ET AL.

INTRODUCTION AND SUMMARY OF REPLY

The Respondents (State Defendants and property rich districts) ignore the plain words of the Texas Constitution and the plain facts of Texas school finance.

The Texas Constitution demands that "all free men... have equal rights and no man or set of men is entitled to exclusive separate public emoluments or privileges but in consideration of public services," Tex.Const.art.I, §3. The Texas School Finance System denies equal rights to students who grow up in low wealth